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No. ——

Supreme Court of the United States

OCTOBER TERM, 1980

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similary situated,

Appellants,

v.

OTIS BOWEN, Governor; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner; THEODORE SENDAK, Attorney General; Their Agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Indiana

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JURISDICTIONAL STATEMENT

Counsel:

ROY LUCAS
LYNN I. MILLER
JEANETTE HELFRICH

LUCAS & MILLER, P.C.

Suite 424
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

Tel: (202) 338-6955

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QUESTIONS PRESENTED

I. Whether the Three-Judge District Court Erroneously Treated the Supplemental Petition for Injunctive Relief as a Rule 60 Motion for Relief from Judgment, When It had Never Entered a Final Judgment On the Merits of the Second Trimester Hospital Restriction in any Previous Proceeding?

II. Whether this Court Should Vacate the Judgment Below and Remand for a Full Hearing before the Entire Three-Judge Court on the Merits of the Second Trimester Hospital Restriction?

III. Whether the District Court Abused Its Discretion in Preliminarily Upholding The Second Trimester Hospital Restriction, When the Overwhelming Majority of Indiana Hospitals Ban all Abortion Services, and there is no Compelling Health Reason for Mandatory Hospitalization?

PARTIES IN THE DISTRICT COURT

The caption identifies all of the parties in the lower court proceedings. The Brigitte Coe and Jane Doe classes seek no relief on this appeal.

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OTIS BOWEN, Governor; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner; THEODORE SENDAK, Attorney General; Their Agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,

Appellees.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The 1980 decision in question upholding the second trimester hospital restriction is reported as *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980) (three-judge court). The text is set out in Appendix A, *infra*, at 1a-18a.

The 1976 decision in *Gary-Northwest* permanently enjoining the parental consent requirement of the Indiana abortion law, IND. CODE 35-1-58.5(a)(2), is reported as 421 F.Supp. 734 (N.D. Ind. 1976) (per curiam) (three-judge court), *aff'd mem.*, 429 U.S. 1067 (1977). The entire text and judgment are set out in Appendices B-D, at 19a-29a. The separate statement of District Judge Sharp appears at 24a-26a.

The 1975 decision in *Gary-Northwest* denying preliminary injunctive relief against the second trimester hospital restriction, IND. CODE 35-1-58.5(b)(2), and resolving other unrelated issues, is reported as 418 F.Supp. 9 (N.D. Ind. 1975) (per curiam) (three-judge court). The text is set out in Appendix E, at 31a-38a. The separate statement of District Judge Sharp appears at 39a.

JURISDICTION

(i) Nature of the Proceeding

This is a civil action brought in 1974 by an Indiana physician, a clinical corporation, and three classes of patients. Plaintiffs are collectively described as "Gary-Northwest" in this Jurisdictional Statement. They asserted civil rights and federal question jurisdiction under 28 U.S.C. Secs. 1331, 1343. The complaint sought declaratory and injunctive relief against the enforcement by state officials of several restrictions in the Indiana laws affecting the medical practice of induced abortion.

(ii) Judgment and Appeal

The District Court filed the order appealed from on September 12, 1980. (App. A at 1a).

No plaintiff sought a rehearing.

Gary-Northwest filed a notice of appeal to this Court in the Hammond, Indiana, District Court on October 14, 1980. (App. F at 41a).

(iii) Jurisdiction in this Court

Section 1253, Title 28, U.S. CODE vests jurisdiction exclusively in this Court because the decision of the three-judge district court below effectively denied preliminary and permanent injunctive relief on the merits. Cases which support jurisdiction over the appeal include: *Brown* v. *Chote,* 411 U.S. 452 (1973); *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194 (1934).

STATUTE INVOLVED

The Indiana statute in question, IND. CODE 35.1-58.5 (b)(2), provides:

> "Abortion shall in all instances be *a criminal act* except when performed under the following circumstances:
>
> * * *
>
> "(b) After the first trimester of pregnancy and before viability, for reasons based upon the *professional judgment* of the pregnant woman's physician provided:
>
> * * *
>
> "(2) It is performed *in a hospital.*" (Emphasis added).

Section (b)(2) makes no exception if hospitals are inaccessible or unwilling to permit second trimester abortions. The statute delegates to hospitals the private power to ban or substantially curtail all second trimester abortions. This reduces *Roe* v. *Wade,* 410 U.S. 113 (1973), to one third of its original constitutional

dimensions. It eliminates the exercise of professional medical judgment as to facility.

STATEMENT OF THE CASE

1974: After the decisions in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), a majority of the Indiana legislators passed a series of new abortion laws, IND. CODE ch. 58.5. These restricted the activities of physicians and patients whenever induced abortion was involved. They imposed strict criminal penalties and included:

(1) a first trimester licensure requirement, ruled invalid in *Sendak* v. *Arnold,* 429 U.S. 968 (1976) (per curiam), *aff'g mem.* 416 F.Supp. 22 (S.D. Ind.) (three-judge court);

(2) a ban on saline abortions (App. E at 33a), similar to the one held unconstitutional in *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 75-79 (1976);

(3) a restriction on post-viability abortions, IND. CODE 35-1-58.5(c)(2), that on its face appears inconsistent with *Colautti* v. *Franklin,* 439 U.S. 379 (1979);

(4) a 24-hour waiting requirement, IND. CODE 35-1-58.5(d), that injected delay and expense for patients, and was similar to one held invalid in *Friendship Medical Center* v. *Chicago Board of Health,* 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975);

(5) a parental consent requirement for unmarried minors, IND. CODE 35-1-58.5(a)(2), and

(6) the total prohibition of Section (b)(2) on out-of-hospital second trimester abortions, regardless of the availability of hospitals or other compelling circumstances.

Gary-Northwest concentrated on a federal court challenge to restrictions (5) and (6). They filed a class action suit on November 13, 1974. (App. E at 31a). A three-judge district court held a hearing on December 13, 1974, to consider requests for preliminary injunctive relief. (App. E at 31a-39a).

Mary Roe, a pseudonymous patient then 16-18 weeks pregnant, sought a preliminary injunction against the ban on non-hospital second trimester abortions. (App. E at 33a-34a). She had requested an abortion from Dr. William Lewis at the Gary-Northwest Clinic. She was refused this treatment, not for any medical reasons, but because it had been made a felony by the legislators.

1975: The three-judge court, on January 31, 1975, denied a preliminary injunction against the Section (b)(2) ban on non-hospital second trimester abortions. (App. E at 34a, 38a). Without extensive discussion the court cited dictum from *Roe* v. *Wade*, 410 U.S. 113, 163 (1973), and concluded:

> "Whether a hospital requirement for the second trimester per se comports with a 'reasonable regulation' standard is not certain and need not be decided at this point."

(App. E at 35a). In 1973 and 1975 that issue had not in fact been presented to this Court. Current evidence was not available on the safety of non-hospital second trimester abortions. No one knew whether the hospitals in practice would unreasonably restrict access to second trimester abortions. Few recognized that a hospital requirement constituted a delegation of authority to ban second trimester abortions altogether, and to abrogate the right of privacy in the second trimester of pregnancy and beyond. The extent of need for second trimester abortions was even speculative.

No parties appealed the preliminary injunction rulings.

1976: In July of the next year this Court decided *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). Two months later the *Gary-Northwest* three-judge court certified this case as a class action. The court then entered a permanent injunction against enforcement of the parental consent requirement of the Indiana law, Section (a)(2). (App. B at 23a).

The court was silent on the still-pending challenge to the ban on non-hospital second trimester abortions. The formal judgment document too does not dispose of the case, but only enjoins Section (a)(2). (App. C at 27a).

District Judge Sharp filed a Separate Statement, referring to this "apparent obligation" to follow precedent from this Court, which he would do "with the greatest reluctance." (App. B at 24a). He criticized this Court as adopting "a watery constitutional concept that can run in any direction chosen by at least five members of the highest Court." (App. B at 24a). No mention was made of the pending hospital/non-hospital problem of Section (b)(2).

1977: The Attorney General of Indiana appealed the Section (a)(2) issue of parental consent. This Court affirmed summarily on January 25, 1977. 429 U.S. 1067. (App. D at 29a).

1980: During the three years following the 1977 judgment neither set of parties moved to advance or dismiss the remaining questions in the case. Medical developments, hospital restrictions, and a threatened criminal prosecution, however, led Dr. Lewis and a Mary Roe

class member to file a supplemental petition for preliminary and permanent injunctive relief on February 21, 1980. (App. A at 2a).

Judge Sharp alone heard argument and evidence on the petition on April 23, 1980. He deferred the case for decision by the entire three-judge panel. Ultimately the opinion stated that:

> "Even if the . . . evidence proved the plaintiffs' allegations"
> [and]
> "Even if the . . . legal theory was accurate, the plaintiffs would have failed to justify a preliminary injunction."

(App. A at 3a, 16a). The court overlooked the incomplete status of the case as described above and erroneously regarded the supplemental petition as a Rule 60 motion for relief from a final judgment. (App. A at 3a).

There never has been a full trial or final judgment on the second trimester hospital rule in this case. The September 1976 decision and judgment speak to parental consent and nothing more. (App. B at 23a, C at 27a). The January 1975 ruling denied only a preliminary injunction (App. E at 34a, 38a) against Section (b)(2). That was not a final judgment subject to Rule 60. A motion for preliminary injunction may be renewed whenever circumstances make it meritorious, provided the permanent injunction issue remains, as here, pending and undecided.

Nonetheless, the district court incorrectly regarded the case as concluded by "the final judgment heretofore entered" (App. B at 18a). The court explicitly denied

further relief. Gary-Northwest at this point has no basis for requesting a final trial in the district court, but must appeal from a ruling which effectively dismisses the entire Section (b)(2) claim.

Rule 60(b) is improperly applied to denial of a preliminary injunction. Rule 60(b) expressly provides relief only from a final judgment. It does not apply to interlocutory orders, although a federal court may exercise its plenary powers over interlocutory decrees anytime before final decree. *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82, 91 (1922) (Permanent injunction with an accounting still pending is interlocutory and may be altered by the court consonant with equity); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970) (Denial of motion for summary judgment is not subject to 60(b) although the court could modify or rescind it before final decree).

By incorrectly interpreting the renewed motion for a preliminary injunction as one for relief from final judgment under FED. R. CIV. P. 60(b), the lower court effectively cut off the opportunity for a full hearing on the merits. By contrast, this Court has repeatedly recognized the importance of a complete factual record before deciding substantial constitutional questions. *Brown* v. *Chote*, 411 U.S. 452, 457 (1973); *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 210 (1934).

Brown was a challenge to a filing fee required of candidates in the California primary elections. A three-judge district court issued a preliminary injunction against the fee requirement. The state appealed directly to the Supreme Court without awaiting a full hearing. The preliminary injunction hearing record was

found insufficient to allow consideration of the far reaching constitutional questions, and this Court remanded for a full hearing. 411 U.S. at 457.

A complete record is particularly essential when some form of government regulation has an onerous impact on the exercise of constitutional rights. The three judge district court in *Borden's Farm Products Co.* v. *Baldwin* had dismissed a complaint for failing to state a claim. There, the plaintiff challenged the impact of certain regulations on the milk industry. This Court emphasized that the plaintiff was entitled to rebut any presumption of constitutionality and show an undue burden on the exercise of its constitutional rights. 293 U.S. at 209. Difficult constitutional issues should not be decided except upon a full record and after adequate hearing. 293 U.S. at 204. *Accord, Polk Co.* v. *Glover,* 305 U.S. 5, 9-10 (1938).

In this case, Gary-Northwest alleged that the Indiana statute limiting all second trimester abortions to hospitals is an overbroad regulation. There were allegations of the unavailability of hospitals that will permit second trimester abortions. Similarly, Gary-Northwest offered to prove the safety of abortion techniques on an outpatient basis after 12 weeks. Yet, the only record established was that of an informal preliminary injunction hearing. Such a bare record was clearly inadequate for the less complicated constitutional challenge found in *Brown* v. *Chote.* The *Borden* decision also illustrates the importance of a detailed record. Gary-Northwest needs a full hearing on the merits to establish an adequate record.

Gary-Northwest Claims and Expected Evidence: The Gary-Northwest position in this Court is straightfor-

ward. Mandatory hospitalization for second trimester abortion has neither the purpose nor necessary effect of promoting maternal health. The restriction is a less-than-subtle means of curtailing second trimester abortions. It delegates control over a constitutional right to private hospital officials. They are given state immunity to exercise a veto much like the parental or spouse vetoes addressed in *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976), and *Bellotti* v. *Baird,* 443 U.S. 662 (1979).

Since the 1973 decisions in *Roe* and *Doe,* induced abortion has been studied in the United States more than any other form of medical or surgical treatment. National and state-by-state reports by major institutions and government agencies explore many of the facts which are highly relevant to the evaluation of claims such as those of Gary-Northwest. This Court may take judicial notice of such studies, as done in *Roe* v. *Wade,* 410 U.S. at 149 n. 44. The studies and/or their findings would be admissible directly or through expert testimony at trial in light of FED. R. EVID. 702, 803(6), and 803(8). Material from two of the most relevant studies is set out in Appendices G & H. A brief outline of pertinent findings and expected trial evidence will complete this statement of the case.

(a) *Limited Accessibility of Hospitals for Second Trimester Abortions*

1/*Indiana*—Indiana "ranks extremely low among the states in availability of abortion services." ALAN GUTTMACHER INSTITUTE (AGI), ABORTION: NEED, SERVICES AND POLICIES, INDIANA (1979) (App. G at 44a).

A recent survey by AGI [1] shows that in 1977 an estimated 40,430 women in Indiana were in need of abortion services. Seventy-five (75) percent were unable to obtain abortions in the state. Many women had to travel long distances to obtain pregnancy terminations. *Id.* at 43a.

The overwhelming majority (84%) of Indiana hospitals veto abortions and provide no type of pregnancy termination services. In 1977 abortions were available in only 16 of the state's 99 hospitals. (App. G at 44a). Only 23 percent of pregnancy terminations in Indiana in 1977 occurred in hospitals. *Id.* Indiana hospitals certainly cannot serve as a haven for maternal health when 84% lock their doors to abortion patients.

2/*The United States*—National data demonstrates that in 1978 nearly half a million women were unable to obtain abortion services. Moreover, the number of hospital abortions has steadily declined since the 1973 *Roe* and *Doe* decisions. Statistics from 1977 and the first quarter of 1978, the most recent available, show that the percentage of abortions done in hospitals fell from 35% in 1976 to 30% in 1977, Forrest, *Abortion in the United States, 1977-1978,* 11 FAMILY PLANNING PERSPECTIVES 329 (1979). (App. H at 47a-50a). Yet in 1973, hospitals had accounted for 52% of all abortions.

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[1] The Alan Guttmacher Institute is a non-profit research, policy analysis and public education organization. AGI conducts an annual survey of all abortion providers, including hospitals, clinics and physicians' offices. The resulting statistics concerning the number of abortions performed are published yearly on the local, state and national level. The United States government has included AGI statistics in its *Statistical Abstract* every year since 1975.

Margaret S v. *Edwards,* 488 F.Supp. 181 (E.D. La. 1980), relied heavily on an AGI survey of second trimester services in Louisiana. *Id.* at 192-93 nn.24, 25, 28, 29, 33.

Seims, *Abortion Availability in the United States,* 12 FAMILY PLANNING PERSPECTIVES 88, 99 (1980). By comparison, the percentage of abortions performed in freestanding clinics rose from 61% in 1976 to 66% in 1977. Forrest, *Abortions in the United States, 1977-1978.* (App. H at 48a).

Nationwide statistics also evidence a decline in second trimester hospital abortions. In 1976, 76% of all such procedures were performed in hospitals compared to only 67% in 1977. (App. H at 61a). Moreover, the hospitals providing midtrimester services "represent only 15 percent of the 5,400 short-term general non-Catholic hospitals in the United States." (App. H at 62a). In 1977, 33% of second trimester abortions took place in clinics.

At the April 23, 1980, hearing the State attempted to rebut the unavailability of second trimester hospital abortions in Indiana. The State produced an affidavit and computer print-out purporting to show the number of Indiana hospitals providing midtrimester abortions in 1978. (App. M at 87a).

This evidence is gravely defective. The affidavit admits that the data concerns pregnancy terminations "where the gestational period was greater than twelve (12) weeks or *unknown.*" (App. M at 87a). (Emphasis added). The "unknown" category invalidates all of the 1978 data. The "unknown" classification must refer to procedures other than routine second trimester pregnancy terminations. The statistics may include procedures on women with tubal pregnancies, uterine fibroids or hydatidiform mole. The last two conditions are not even pregnancy related. The State's statistics are speculative and lack foundation.

In addition, the list of "hospitals" on the print-out includes many outpatient non-hospital facilities. A hand-written notation of unknown origin states: "gestation period greater than 12 weeks." This is the only indication that the print-out concerns midtrimester abortions. (App. M at 88a). The State never identified the individual who added this information. All these factors negate the state's evidence, or at least call for scrutiny and cross-examination.

The State's evidence on the Indiana maternal mortality rate does not validate the ruling below. This statistic is not relevant to the acceptability of performing a certain medical procedure in an outpatient setting. It was not the only factor relied on by *Roe*. To decide this question, the Court must rely on the medical studies concerning the safety of this practice.

At trial, Gary-Northwest will show that even the small number of purported hospital procedures do not fulfill the need for second trimester abortions in Indiana.

(b) *Acceptability of Performing Midtrimester Procedures in a Non-Hospital Setting*—Nationally known medical experts acknowledge the safety of performing second trimester abortion procedures in free-standing outpatient facilities. S. NEUBARDT & H. SCHULMAN, TECHNIQUES OF ABORTION 72 (2d ed. 1977); Cates, *D & E After 12 Weeks: Safe or Hazardous?*, 13 CONTEMPORARY OBSTETRICS/GYNECOLOGY 23-24 (January, 1979); Hern, *Multiple Laminaria Treatment in Early Midtrimester Outpatient Suction Abortion: A Preliminary Report*, 12 ADVANCES IN PLANNED PARENTHOOD 93 (1977); Schulman, *Outpatient Saline Abortion*, 37 OBSTETRICS & GYNECOLOGY 521 (1971); Soderstrom,

Outpatient Saline Abortion: A Review of 1,000 Cases, 12 ADVANCES IN PLANNED PARENTHOOD 98 (1977).

Even a medical expert testifying in support of a Missouri hospital law admitted that mortality and morbidity rates for "D & E procedures performed outside a hospital were no different than those performed in a hospital." *Planned Parenthood* v. *Ashcroft,* 483 F. Supp. 679, 687 n. 12 (W.D. Mo. 1980), *on appeal,* No. 80-1130 (8th Cir. 1980) (argued Nov. 17, 1980). The same conclusion applies to second trimester instillation abortions. Schulman, *Outpatient Saline Abortion,* 37 OBSTETRICS & GYNECOLOGY 521 (1971).

The American Public Health Association (APHA) also favors the performance of midtrimester procedures in non-hospital facilities. American Public Health Association Resolution, "The Right to Second Trimester Abortion" (Adopted November, 1979) (App. I at 65a).

Such evidence establishes that there is no compelling medical need for restricting all second trimester abortions to hospitals.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

This appeal presents substantial constitutional questions involving a statute not addressed by *Roe* v. *Wade,* 410 U.S. 113 (1973), *Doe* v. *Bolton,* 410 U.S. 179 (1973), or subsequent decisions. The provision in question affects thousands of individuals. This statute impacts adversely upon the practice of medicine in numerous states. In particular, the law abridges a physician's freedom to provide patients with reasonable and appropriate medical care. It also severely restricts

a woman's access to and freedom of choice concerning midtrimester abortions. This law violates Fourteenth Amendment rights of privacy and liberty.

The question here is the subject of a considerable volume of pending litigation. This issue, which will eventually reach this Court, has profound national significance. Lastly, the ruling below is inconsistent with this Court's decisions recognizing physician independence in the abortion field, *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976), and *Colautti* v. *Franklin,* 439 U.S. 379 (1979), and prohibiting third party veto over the abortion decision. *Planned Parenthood* v. *Danforth,* 428 U.S. at 67-75; *Bellotti* v. *Baird,* 443 U.S. at 662.

I.

THE DISTRICT COURT ERRED IN PRELIMINARILY UPHOLDING THE SECOND TRIMESTER HOSPITAL RESTRICTION WHEN THE OVERWHELMING MAJORITY OF INDIANA HOSPITALS BAN ALL ABORTION SERVICES AND THERE IS NO COMPELLING HEALTH REASON FOR MANDATORY HOSPITALIZATION.

A. The Appeal Presents Substantial Federal Questions Of Nationwide Medical And Public Concern.

Indiana is not the only state to ban all second trimester abortions outside hospitals.

At least 16 other states have a hospital requirement for second trimester abortions.[2] Physicians and women

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[2] These include Connecticut, Hawaii, Idaho, Illinois, Massachusetts, Montana, New York, North Dakota, Oklahoma, Pennsylvania, Tennessee and Virginia. Utah requires that a midtrimester pregnancy termination take place in a hospital or a freestanding clinic with the same degree of safety as a hospital. *See* THE ALAN GUTTMACHER INSTITUTE, ABORTION: NEED, SERVICES, AND POLICIES,

in all these states are unduly burdened by this arbitrary, discriminatory and medically unjustifiable limitation.

In practice, a hospital restriction creates a Catch-22 situation for physicians and their patients. The majority of hospitals do not permit abortions on their premises. This problem exists not only in Indiana, but the entire country. Forrest, *Abortion in the United States, 1977-1978,* 11 FAMILY PLANNING PERSPECTIVES 329 (1979) (App. H at 62a).

Further, a large number of states have enacted "Conscience Clauses." These statutes authorize hospitals to prohibit abortions,[3] and immunize the institutions from liability.

INDIANA, 24-27 (1979). The City of Akron, Ohio, enacted an abortion ordinance which contained a second trimester hospital restriction. *Akron Center for Reproductive Health* v. *City of Akron,* 479 F.Supp. 1172 (N.D. Ohio 1979), *on appeal,* No. 79-3700 (6th Cir. 1980) (argued Oct. 23, 1980).

Hospital restrictions in Louisiana, Missouri, and Kentucky have been permanently enjoined. These decisions are, respectively, *Margaret S.* v. *Edwards,* 488 F.Supp. 181 (E.D. La. 1980); *Planned Parenthood* v. *Ashcroft,* 483 F.Supp. 679 (W.D. Mo. 1980), *on appeal,* No. 80-1130 (8th Cir. 1980) (argued Nov. 17, 1980); *Wolfe* v. *Stumbo,* No. C 80-0285 L(A) (W.D. Ky. Dec. 3, 1980) (App. J at 67a).

[3] Twenty-two states permit both public and private hospitals to adopt such a restriction. They are Arizona, Arkansas, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, Washington and Wisconsin. THE ALAN GUTTMACHER INSTITUTE, ABORTION: NEED, SERVICES AND POLICIES, INDIANA, 24-27 (1979). Indiana authorizes private hospitals to ban such services. IND. CODE 16-10-3-1.

Lastly, efforts to change hospital policy are often fruitless. Such a task would involve convincing not only the administration, but staff physicians, and a board of directors.

The need for midtrimester abortions in nonhospital clinics has national recognition within the medical profession. As the studies cited previously demonstrate, experts support a non-hospital setting for abortions at this stage in the pregnancy. Moreover, the American Public Health Association has endorsed the provision of second trimester abortions in freestanding clinics. (App. I at 65a-66a).

The above demonstrates that the second trimester hospital restriction has sufficient national significance to warrant plenary consideration by this Court.

B. The Decision Below Conflicts with *Roe* v. *Wade* and This Court's Subsequent Abortion Decisions.

The ruling below has numerous inconsistencies with this Court's line of abortion decisions. First, the panel applied the rationality test to the Indiana statute. The decision below thus ignored this Court's consistent strict review of restrictions on the abortion decision and its effectuation in the later stages of pregnancy. Second, it erred in asserting that *Roe* v. *Wade* summarily authorizes such a law.

Third, the case below disregards precedent preserving the physician's independent judgment in the abortion context. *Colautti* v. *Franklin,* 439 U.S. at 379; *Planned Parenthood* v. *Danforth,* 428 U.S. at 64-65. Fourth, this Court's prohibition against a third party veto was also disregarded. *Bellotti* v. *Baird,* 443 U.S. at 662; *Planned Parenthood* v. *Danforth,* 428 U.S. at 67-75.

Lastly, the panel erroneously applied the rationale of the Medicaid funding decisions, *Harris* v. *McRae,* 65 L.Ed.2d 784 (1980), and *Maher* v. *Roe,* 432 U.S. 464 (1977), to this case.

Indeed, in *Harris,* the Court described the appropriate test for such a provision:

> "It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is *presumptively unconstitutional.*' "

Id. at 801 (emphasis added).

This Court has not granted states unbridled discretion to enact abortion restrictions as the pregnancy progresses. *Roe* v. *Wade,* 410 U.S. at 113, enunciated a stringent test for provisions which limit a fundamental right. Such a law must serve a compelling state interest *and* be narrowly tailored to further that interest. *Id.* at 155.

The same strict test applies to regulations substantially limiting access to the means of effectuating the abortion decision as to laws prohibiting the decision completely. *Carey* v. *Population Services International,* 431 U.S. 678 (1977).

The statute in question, contrary to the lower court's assertion, directly impacts on the fundamental right of privacy. It restricts the woman's access to non-hospital facilities in the second trimester. This adverse effect is suffered by all women, whether they are financially capable or incapable of obtaining a hospital abortion. Similarly, the provision penalizes the physician who would choose a non-hospital facility.

The Court has closely examined post-first trimester restrictions in both *Planned Parenthood* v. *Danforth*, 428 U.S. at 52, and *Colautti* v. *Franklin*, 439 U.S. at 379. Both times the Court refused to defer to the legislature. In *Danforth*, the Court rigorously scrutinized the law banning saline instillation and reexamined the insupportable and speculative legislative findings. The Court then invalidated the statute. *Id.* at 79.

Subsequently, the Court strictly scrutinized a viability statute in *Colautti* v. *Franklin*, 439 U.S. 379 (1979). It refused to apply minimal review despite the State's asserted interest in promoting potential life.

Such active review establishes that the instant case falls squarely within the *Danforth* ruling. The Court struck down the saline instillation ban because it sharply reduced access to second trimester abortions. It characterized the restriction as:

> "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge."

Id. at 79. The same ruling applies to the Indiana law.

The court below, however, disregarded the strict constitutional analysis required by *Roe*, *Danforth* and *Colautti*. Instead, it mistakenly concluded that *Roe* forecloses any judicial inquiry into the burdens and adverse effects of a mandatory second trimester hospital rule. That was simply not the case. This contention was based on a superficial reading of *Roe*.

Moreover, several crucial factors militate against accepting the *Roe* dictum as to a post-first trimester hospital rule as a final pronouncement on the issue. 410 U.S. at 163. First, neither *Roe* nor *Doe* considered medical evidence as to the safety of performing midtrimester procedures in non-hospital facilities. This data was not compiled at that time or presented to the Court. Second, the Court could not have foreseen the steady nationwide decline in the number of hospitals permitting abortion services. Third, there were no available statistics on the extent of need for midtrimester abortions when *Roe* was decided.

The panel below also mistakenly relied on *Harris* v. *McRae*, 65 L.Ed.2d at 784, and *Maher* v. *Roe*, 432 U.S. at 464. These decisions do not apply to laws which, as here, directly interfere with effectuation of the abortion decision. The obstacle here—a ban on non-hospital midtrimester abortions—is government-created. All women, not just the indigent, are affected by this law. Whether or not she has adequate financial resources, a woman in Indiana cannot obtain a second trimester abortion in a setting other than a hospital or hospital-like facility.[4]

The court below also failed to consider the hospital rule in light of its similarity to the parental and spou-

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[4] The Indiana law permits second trimester abortions in licensed ambulatory surgical centers. This factor does not justify the hospital rule. The record below does not fully describe the licensure requirements or show their relevance to midtrimester procedures. Moreover, plaintiff Dr. Lewis testified that the cost of meeting these requirements is prohibitive. Transcript of April 23, 1980, Hearing at 81. Lastly, *Sendak* v. *Arnold*, 429 U.S. 968 (1976), *aff'g mem.*, 416 F.Supp. 22 (S.D. Ind.), casts doubt on the constitutionality of these regulations.

sal vetoes invalidated in *Planned Parenthood* v. *Danforth,* 428 U.S. at 72-75, and *Bellotti* v. *Baird,* 443 U.S. at 662. Like those provisions, this law empowers a third party, a hospital, to block access to abortion services.

Lastly, the panel below disregarded established precedent concerning physician independence in the abortion context. This Court has consistently rejected placing

> "the attending physician in an undesired straitjacket in the practice of his profession."

Planned Parenthood v. *Danforth,* 428 U.S. at 67 n. 8.

Danforth amply supports permitting the physician to determine the appropriate setting for a midtrimester abortion. There, this Court left the viability determination to "the physician in the exercise of his professional judgment." *Id.* at 64-65. Thus, even in this late stage of pregnancy, when the state's ability to regulate abortion is greatest, the Court preserved the physician's professional freedom.

It did so again in *Colautti* v. *Franklin,* 439 U.S. at 379. The Court invalidated the Pennsylvania viability statute, explaining it did not "afford broad discretion to the physician." *Id.* at 394.

The same characterization applies to the Indiana mandatory hospital rule. Indeed, the statutory language permitting the physician to exercise his "professional medical judgment" concerning midtrimester abortions, IND. CODE 35-1-58.5(b), is otherwise meaningless. The physician's judgment is nullified as to choice of facility. *Danforth* and *Colautti,* which entrust doctors with the crucial viability determination, fully support physician discretion in this matter. Yet the

court below did not even consider the question in light of this precedent.

In sum, the decision below incorrectly applies the principles of *Roe* and *McRae*. It also disregards the applicable precedent concerning physician independence and third party vetoes. This Court should grant review to correct the erroneous reasoning and results.

C. The District Court Decision Conflicts With Other Federal Court Rulings

The ruling appealed from also conflicts with several better reasoned opinions. Federal district courts in the Fifth, Sixth and Eighth Circuits have permanently enjoined second trimester hospital requirements. *Margaret S.* v. *Edwards,* 488 F.Supp. 181 (E.D. La. 1980); *Planned Parenthood* v. *Ashcroft,* 483 F.Supp. 679 (W.D. Mo. 1980), *on appeal,* No. 80-1130 (8th Cir. 1980) (argued Nov. 17, 1980); *Wolfe* v. *Stumbo,* No. C 80-0285 L(A) (W.D. Ky. Dec. 3, 1980). (App. J at 67a).

Additionally, the Fourth Circuit has voiced doubts as to the validity of the Virginia hospital law. *Simopoulous* v. *Virginia State Board of Medicine,* No. 80-1431 (4th Cir. Aug. 18, 1980). (App. K at 77a).

The *Margaret S., Ashcroft* and *Wolfe* courts all strictly reviewed their respective hospital rules. The courts noted expert testimony concerning the safety of performing second trimester procedures in outpatient facilities. *Margaret S.* v. *Edwards,* 488 F.Supp. at 195 n. 40; *Planned Parenthood* v. *Ashcroft,* 483 F. Supp. at 685. *Margaret S.* concluded that a hospital requirement forced women to choose more dangerous alternatives than a second trimester abortion in a clinic,

"where such abortions are now safely performed." *Id.* at 193.

The lack of sufficient hospital facilities was also a significant factor to the courts. *Margaret S.* v. *Edwards,* 488 F.Supp. at 192-93; *Planned Parenthood* v. *Ashcroft,* 483 F.Supp. at 686-87. The fact that Kentucky hospitals permitted therapeutic midtrimester procedures did not justify the law in *Wolfe* v. *Stumbo.* The court there noted that "abortions which are done for therapeutic reasons constitute a very small portion of the total abortions which are being performed." (App. J at 68a). As previously stated, very few Indiana hospitals provide abortion services.

All three courts analogized the hospital requirement to the prohibition on saline instillation in *Danforth,* 428 U.S. at 75-79. *Margaret S.* explained:

> "As in *Danforth,* the anomaly in the instant case is that the statute would act to proscribe the safest alternative presently available for post-first trimester abortions, that is performing post-first trimester abortions in a clinic."

488 F.Supp. at 193.

In addition, *Margaret S.* ruled that a second trimester hospital restriction is actually detrimental to women. The court specifically noted that the prohibition against midtrimester clinic procedures "would increase problems of maternal health care." *Id.* Otherwise women face three alternatives to continuing the pregnancy. These are: self-induced abortion, abortion from a non-physician, or travel to out-of-state facilities. This Court has catalogued the adverse health effects of carrying an unwanted pregnancy to term. *Roe* v. *Wade,* 410 U.S. at 153. The dangers of illegal

or self-induced abortion "are clear." *Margaret S.* v. *Edwards,* 488 F.Supp. at 193.

Out-of-state travel also creates injurious consequences. These include a greater likelihood the woman cannot obtain the abortion,[5] longer delays, an increase in morbidity and mortality rates, *id.* at 194, and serious disruptions of the woman's family life, work and/or schooling. The lower court took none of these effects into account.

The detriments associated with the hospital restriction led *Margaret S.* to conclude that, as did the *Danforth* saline prohibition, the Louisiana law bore no reasonable relationship to the woman's health. Instead, the provision "burden(ed) an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Id.* The same conclusion applies to the Indiana statute. It fails even the more lenient rationality test.

Wolfe v. *Stumbo* specifically criticized the decision below for viewing the language of *Roe* as "graven in stone." (App. J at 74a). "This [approach]," concluded *Wolfe,* "completely overlooks the Supreme Court's reliance on improvements in medical techniques and skills "on which the Court relied when striking down the saline instillation ban in *Danforth.* (App. J at 74a).

Furthermore, the Fourth Circuit has questioned the validity of the Virginia second trimester hospital rule.

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[5] A recent study demonstrates that "the farther a woman has to travel to obtain an abortion, the less likely she is to obtain one." Shelton, *Abortion Utilization: Does Travel Distance Matter?,* 8 FAMILY PLANNING PERSPECTIVES 260 (1976).

Simopoulos v. *Virginia State Board of Medicine,* slip op. (App. K at 77a). There, a physician challenged summary revocation of his medical license following a conviction for performing a midtrimester instillation procedure outside a hospital. The Fourth Circuit stayed the revocation. It described the criminal appeal, which included a challenge to the hospital rule, as a "position (which) commands respectable support." *Id.*

The district court cites four cases to support its ruling. Two suffer from the same analytical defects as the decision below. *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* No. C78-155A (N.D. Ohio Oct. 4, 1979), *on appeal,* No. 79-3700 (6th Cir. 1980) (argued Oct. 23, 1980) (App. L at 81a); *Wynn* v. *Scott,* 449 F.Supp. 1302 (N.D. Ill. 1978), *aff'd on other grounds sub nom. Wynn* v. *Carey,* 599 F.2d 193 (7th Cir. 1979). Two are inapplicable. *Hodgson* v. *Lawson,* 542 F.2d 1350 (8th Cir. 1976), did not involve the type of statute at issue here. Minnesota has never had a hospital law for abortions after 12 weeks and prior to viability. *Westchester Women's Health Organization, Inc.* v. *Whalen,* 475 F.Supp. 734 (S.D.N.Y. 1979), concerned only regulation of first trimester abortions.

Given this split of authority, the question raised here is substantial and requires full briefing and argument before this Court.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION

The trial court abused its discretion in four ways. First, it refused to grant a preliminary injunction against a state statute that impermissibly burdens an important constitutional right. Second, the court erro-

neously treated appellants' renewed motion for a preliminary injunction as a motion for relief from final judgment. This effectively cut off the opportunity for a full hearing on the merits. Third, the court relied on facially imprecise evidence. Fourth, it applied the wrong standard of constitutional scrutiny in reviewing the challenged statute. For these reasons, this Court should find that the district court abused its discretion.

CONCLUSION

For the reasons set out, this Court should note probable jurisdiction, and set this case down for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

LUCAS & MILLER, P.C.
Suite 424
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 338-6955

By: _____
Roy Lucas

By: _____
Lynn I. Miller

By: _____
Jeanette Helfrich

Attorneys for Appellants

January 27, 1981

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hearing Held April 23, 1980

Decided September 12, 1980

No. H74-289

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGETTE COE; and all others similarly situated,

Plaintiffs,

v.

OTIS BOWEN, Governor of the State of Indiana; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; THEODORE SENDAK, Attorney General of the State of Indiana; Their agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,

Defendants.

Before Robert A. Sprecher, Circuit Judge; Jesse E. Eschbach, District Judge, and Allen Sharp, District Judge.
SHARP, J.

MEMORANDUM AND ORDER

An abortion clinic, its operator, and certain pregnant women brought this class action challenging the constitutionality of certain provisions of the Indiana abortion statute, IC 35-1-58.5. This action was originally filed on Novem-

ber 13, 1974. A three-judge district court was convened pursuant to 28 U.S.C. § 2281.[1]

This Court granted the plaintiffs certain preliminary injunctive relief on January 31, 1975: *Gary-Northwest Indiana Women's Services, Inc. v. Bowen,* 418 F. Supp. 9. This Court granted the plaintiffs certain permanent injunctive relief on September 14, 1976: *Gary-Northwest Indiana Women's Services, Inc. v. Bowen,* 421 F. Supp. 734. That final order was affirmed by the Supreme Court of the United States on January 25, 1977: *Bowen v. Gary-Northwest Indiana Women's Services, Inc.*, 429 U.S. 1067. The case then lay dormant until February 21, 1980, when the plaintiffs filed a petition for a hearing on the application of Mary Roe[2] for preliminary and permanent injunctive relief against the enforcement of the Indiana abortion statute's hospitalization requirement for all second trimester abortions. An evidentiary hearing was held before Judge Allen Sharp on April 23, 1980. The parties were given time to file supplemental briefs. Judge Sharp referred all matters and issues to all the judges of the panel for consideration and determination.

The plaintiffs are requesting a modification of this Court's previously entered final judgment. In the first order, granting preliminary relief, this Court declined to hold Indiana's hospitalization requirement unconstitutional. In

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[1] This section has since been repealed. Jurisdiction over this case nonetheless rests in a three-judge panel because this section was in effect as of the date the complaint was filed. ***BT Investment Managers, Inc. v. Lewis,*** 559 F. 2d 950 (5th Cir. 1977), ***Calabi v. Malloy,*** 438 F. Supp. 1165 (D. Vt. 1977), Act of Aug. 12, 1976, Pub. L. No. 94-381, § 7.

[2] The Mary Roe seeking injunctive relief is apparently a class member and not the named plaintiff Mary Roe. See Transcript of Hearing on Plaintiff's Petition, April 23, 1980, at 65 (hereinafter cited as Tr. ——).

the final order granting permanent relief, this Court declined to modify its previous refusal to rule Indiana's hospitalization requirement unconstitutional. The plaintiffs are requesting this Court to modify its final order and hold the hospitalization requirement unconstitutional.

Modifications of final orders are governed by Fed. R. Civ. P. 60. The plaintiffs request relief from the final judgment on the basis of evidence proving that only one hospital in Indiana will allow non-therapeutic second trimester abortions and evidence proving that childbirth is more dangerous to a mother's health than certain second trimester abortions.

Even if the plaintiffs' evidence proved the plaintiffs' allegations, this Court's prior ruling would remain unaffected. Accordingly, the requested relief from final judgment will be denied.

I.

Before reaching the substantive issues of the plaintiffs' petition, an abstention argument must be considered. Both the state attorney general and the Lake County prosecutor have argued that under *Younger v. Harris*, 401 U.S. 37 (1971), this Court should abstain from this case in order to avoid interfering with the state prosecution of the plaintiff William R. Lewis, M.D.; operator of the plaintiff abortion clinic. On February 21, 1980, when the plaintiffs first requested the preliminary and permanent injunctive relief, the plaintiff Dr. Lewis was being prosecuted for violating the Indiana abortion statute. See Plaintiff's Reply Brief filed April 18, 1980. But, before the April 23, 1980, evidentiary hearing, the criminal action against Dr. Lewis had been dismissed. Tr. 7. A criminal statute regulating abortions may be challenged in federal court by persons who otherwise have standing if they are not presently being prosecuted. See *Roe v. Wade*, 410 U.S. 113 (1973). Neither

Dr. Lewis nor any other plaintiff is presently being prosecuted. Abstention does not apply to this case.

II.

A.

The plaintiffs' argument is as follows: (1) Only one Indiana hospital, the Methodist Hospital of Gary, Inc., located in Gary, Indiana, will allow the use of its facilities for the performance of non-therapeutic second trimester abortions; (2) Some indigent women cannot afford the expense of traveling to the Gary Methodist Hospital for the purpose of acquiring a non-therapeutic abortion; (3) Indiana's requirement that all second trimester abortions be performed in a hospital therefore requires some indigent women to bear a child rather than acquire a non-therapeutic second trimester abortion; (4) Childbirth is more dangerous to a mother's health than a second trimester abortion, if the abortion is performed during approximately the first half of the second trimester of pregnancy, and if the dilatation and evacuation (D & E) method is used; (5) Therefore, Indiana's hospitalization requirement forces some indigent women to pursue a course of action which is more dangerous to their health than the course of action which they would pursue in the absence of Indiana's hospitalization requirement; (6) Therefore, Indiana's hospitalization requirement does not "reasonably relate to maternal health" and is accordingly unconstitutional. See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

In Roe, the Supreme Court of the United States summarized the relevant portions of its ruling as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

410 U.S. at 164-65.

The plaintiffs argue that for purposes of determining the constitutionality of regulations, the second trimester must now be divided into two approximately equal time periods. The earlier of these periods is the thirteenth through the eighteenth week of pregnancy. The later of these periods is the nineteenth through the twenty-fourth week of pregnancy.[3]

The plaintiffs do not argue that a hospitalization requirement applying only to late second trimester abortions would be unconstitutional. It is clear that throughout nearly all of the late second trimester, *Roe* holds that a state's only com-

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[3] It is not clear from the record the exact point at which the plaintiffs believe the second trimester should be divided. However, the plaintiffs' argument is based solely on improvement in the D & E abortion technique. The plaintiff doctor testified that he would not perform D & E abortions as late as the twenty-first week, but that he would perform D & E abortions through the sixteenth week. Tr. 57, 71, 78. Certain statistics introduced indicated that D & E abortions have been performed as late as the twenty-first week. Tr. 78. The eighteenth week is used as a cutoff here because that is the cutoff used in the two district court cases which adopted the plaintiffs' theory. The ultimate ruling in this case renders the specific cutoff irrelevant.

pelling interest is in protecting maternal health. Under *Roe* it is only when the child becomes viable that the state's interest in protecting the child's life becomes compelling. Most children reach viability, given present medical technology, sometime near the twenty-fourth week.[4] Nonetheless, the plaintiffs agree that *Roe* would allow a hospitalization requirement for abortions performed during the late second trimester because the dangers to the mother are great enough to render a hospitalization requirement reasonably related to maternal health.[5] There is no dispute about the constitutionality of a hospitalization requirement for late second trimester abortions.

The plaintiffs argue only that the hospitalization requirement is unconstitutional when applied to certain early second trimester abortions. Throughout the earlier half of the second trimester, the fetus is clearly not viable, given present medical technology. (Assuming continued progress is our technical ability to provide substitutes for the

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[4] Seven years ago, in *Roe*, the Supreme Court noted that current technology made a child viable sometime between the twenty-fourth and twenty-eighth week. 410 U.S. at 160. Some of the plaintiffs' argument seems to imply an attack on Indiana's use of the word "viability". It seems that the plaintiff is arguing that for each specific child the point of viability is so difficult to determine that a state criminal statute using the term is unconstitutionally vague. See Plaintiffs' Supplemental Brief filed May 19, 1980, at page 2. A child's viability is determined by many factors besides the child's prenatal age, including, among other factors, the availability of medical technology capable of providing the child with substitutes for the functions performed by the womb of the child's mother. If this Court were writing on a clean slate, this Court might give serious attention to this argument. However, in *Roe* the Supreme Court of the United States has encouraged, perhaps even required, the use of the term in statutes regulating abortions. This Court could not rule that the Supreme Court of the United States has encouraged the use of an unconstitutionally vague term.

[5] See footnote 3, supra.

mother's womb, it is not altogether inconceivable that viability, and a state's compelling interest in preserving the child's life, may well at some future time reach into this time period.) For the present, *Roe* means that a state's only compelling interest during the early second trimester is in maternal health. The plaintiffs argue that a hospitalization requirement applying to certain early second trimester abortions is unconstitutional.

The plaintiffs do not argue that a hospitalization requirement applying only to early second trimester abortion techniques other than D & E would be unconstitutional. The plaintiffs agree that for procedures other than D & E a hospitalization requirement reasonably relates to maternal health. Tr. 22-23. The plaintiffs argue only that certain early second trimester D & E abortions are so safe that applying Indiana's hospitalization to them does not reasonably relate to maternal health.

Furthermore, the plaintiffs' argument may not apply to therapeutic abortions. The plaintiffs appear to argue not that the hospitalization requirement is unconstitutional on its face, but that it is unconstitutional because hospitals are unavailable. Hospitals are available for therapeutic abortions. See Tr. 74-75 and Defendant's Exhibit A. The plaintiffs' argument may apply only to non-therapeutic early second trimester D & E abortions.

Finally, the plaintiffs' argument may not apply to pregnant women financially capable of traveling to the Gary Methodist Hospital to acquire an abortions. The plaintiffs appear to argue that Indiana's hospitalization requirement denies abortions to only certain indigent women, indigent women financially unable to travel to the Gary Methodist Hospital.

The plaintiffs' constitutional arguments seem to apply only to non-therapeutic early second trimester D & E abortions desired by indigent women financially unable to travel

to the Gary Methodist Hospital.[6] The plaintiffs argue that since Indiana's hospitalization requirement applies to these abortions, the hospitalization requirement is unconstitutionally overbroad. See Plaintiffs' Supplemental Brief filed May 19, 1980 at page 2.

B.

To adopt the plaintiffs argument would require this Court to controvert the express language of *Roe*. With regard to second trimester abortions, the Supreme Court of the United States said:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Examples of permissible state regulation in this area are requirements* as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or*

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[6] It should be noted here that the plaintiffs have presented no evidence that there is, in Indiana, a pregnant woman (1) financially unable to travel to the Gary Methodist Hospital who desires a (2) non-therapeutic (3) early second trimester (4) D & E abortion. Even the plaintiff, Mary Roe, on whose behalf the plaintiff's latest petition has been made, fails to satisfy the criteria since she is a patient of Dr. Lewis, which implies that she is financially able to travel to Gary and the Gary Methodist Hospital, since Dr. Lewis practices medicine in Gary.

> *may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.
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> To summarize and to repeat:
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> • • • • •
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> For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

410 U.S. at 163-64 (emphasis added).

The language is clear. A hospitalization requirement for second trimester abortions is constitutional. Indiana and many other states have relied on this interpretation of the language. This Court has "an obligation to follow the precedents of our highest Court." *Gary-Northwest Indiana Women's Services v. Bowen,* 421 F. Supp. 734, 836 (N.D. Ind. 1976) (separate statement of Judge Sharp in an earlier decision in this action.) This Court is bound by the language of *Roe.* This Court may not controvert specific rulings of the Supreme Court of the United States. The express language of *Roe* mandates that Indiana's second trimester hospitalization requirement be found by this Court to be constitutional.

Several cases have interpreted *Roe* to mean that a second trimester hospitalization requirement is constitutional: *Hodgson v. Lawson,* 542 F. 2d 1350 (8th Cir. 1976); *Akron Center for Reproductive Health, Inc. v. City of Akron,* 479 F. Supp. 1172 (N.D. Ohio 1979); *Westchester Women's Health Organization, Inc. v. Whalen,* 475 F. Supp. 734 (S.D. N.Y. 1979); and *Wynn v. Scott,* 449 F. Supp. 1302 (N.D. Ill. 1978), *affirmed sub nom., Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979). These cases relied generally on the statement in *Roe* that a second trimester hospitalization

requirement is constitutionally permissible. Two very recent cases have interpreted *Roe* to mean that a second trimester hospitalization requirement is unconstitutional: *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980), and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 483 F. Supp. 679 (W.D. Mo. 1980). The plaintiffs rely on these recent cases.

To adopt the plaintiffs' theory and hold Indiana's hospitalization requirement unconstitutional because of its impact on non-therapeutic early second trimester D & E abortions would ultimately require that the second trimester be split for purposes of determining the constitutionality of regulations. Such a holding would require states to adopt, for their maternal health regulations, some cutoff other than the end of the first trimester. The *Roe* language clearly demonstrates the intent of the Supreme Court to encourage, indeed force, states to use the end of the first trimester as a cutoff point for regulations designed to protect maternal health. That is precisely what Indiana and many other states have done. *Roe* implied that states would not be required to treat one portion of the second trimester different from another portion of the second trimester. *Roe* implied that it was proper for states to adopt regulations dealing with the entire second trimester. If a general regulation of second trimester abortions protects maternal health, then, *Roe* holds, the regulation is constitutional, notwithstanding its impact on a specific second trimester abortion or a specific group of second trimester abortions.

The plaintiffs' argument could be construed as an argument that the *Roe* test to be applied to early second trimester D & E abortions is not the second trimester test, but the first trimester test. This argument could be stated as follows: *Roe* allows regulation not of second trimester abortions, but only of abortions more dangerous than childbirth. This seems to be the theory underlying the two District Court cases supporting the plaintiffs' argument.

The specific ultimate rulings in *Roe* with regard to the various stages of pregnancy were somewhat arbitrary judgments necessitated by a wide variety of factors. This Court must respect *Roe's* specific ultimate rulings. If this Court does not respect the specific ultimate rulings in *Roe,* those rulings will lose their usefulness. If the line which the Supreme Court drew at the end of the first trimester is not respected, states will be hard pressed to pursue their legitimate, compelling, interests in protecting maternal health. If a regulation is covered by *Roe,* the regulation's constitutionality is determined on the basis of the specific lines drawn by the Supreme Court.

If the plaintiffs' theory was adopted, then the states might still be able to remain within constitutional parameters by repealing their current maternal health regulations and enacting regulations applying not to abortions performed "after the first trimester," but to abortions performed "in such a manner and at such a time that they are more dangerous than childbirth." If the Supreme Court had intended the test for determining whether a state could regulate a specific abortion to be the safety of the abortion relative to childbirth, the Supreme Court would have so stated the test. The Supreme Court did not so state the test. The Supreme Court stated the test to be the chronological stage of the pregnancy. Under *Roe,* a maternal health regulation may take effect at the end of the first trimester. If the constitutionality of the regulation depended on whether, as a matter of fact, an abortion was more dangerous than childbirth, then it must be remembered that each individual pregnancy raises its own set of facts. The safety of a given abortion, the safety of a given childbirth, and the relative safety of an abortion *vis a vis* childbirth in a given pregnancy, all depend on a multitude of medical factors which vary with each and every pregnancy. Such a rule would have the potential of making the constitutionality of each specific application of a regulation depend to a large degree on the factors present in

that specific case. If the Supreme Court had intended that complicated medical judgment be decisive on whether specific regulations were reasonably related to maternal health, then the Supreme Court would surely have instead adopted the more rational rule that the abortion's effectuation must be left to the medical judgment of the pregnant woman's attending physician. That was the rule adopted for first trimester abortions. It was the intent of the Supreme Court to allow states to regulate second trimester abortions as a group, and *Roe* holds that as long as the regulation is reasonably related to the maternal health of women in the second trimester of their pregnancy, the regulation is constitutional.

The plaintiffs argument could also be construed as an argument that Indiana's hospitalization requirement is subject not to the first trimester test, but to the second trimester test, but that the hospitalization requirement does not satisfy the second trimester test. This argument would be applicable exclusively to the regulation as applied to women financially incapable of traveling to the Gary Methodist Hospital. The argument would be that the regulation effectively prevents these women from obtaining an abortion which is less dangerous than childbirth, and that the regulation is therefore not rationally related to maternal health. While the Supreme Court held in *Roe* that states may not constitutionally prohibit certain abortions, the Supreme Court has since held that states are not required to guarantee the practical availability of abortions to indigent women. It follows that in regulating second trimester abortions, Indiana is not required to guarantee the availability of abortions to indigent women. As long as the regulation is reasonably related to Indiana's compelling interest in protecting maternal health, the regulation is constitutional, without regard to the regulation's practical impact on the availability of abortions to indigent women. In *Maher v. Roe,* 432 U.S. 464 (1977), the Supreme Court held that it was constitutional for Connecticut to

prevent the use of its welfare benefits for non-therapeutic abortions. The Supreme Court said:

> The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.

432 U.S. at 474. The latest Supreme Court abortion cases are the companion cases *Harris v. McRae*, —— U.S. ——, 48 U.S.L.W. 4941 (1980), and *Williams v. Zbaraz*, —— U.S. ——, 48 U.S.L.W. 4957 (1980), which apply the *Maher v. Roe* reasoning to the refusal by both the federal and state governments to fund certain abortions which were therapeutic. In *Harris v. McRae*, the Supreme Court said:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

—— U.S. at ——, 48 L.W. at 4946. The background of *Harris v. McRae* is that the government had been paying welfare benefits for both childbirth and abortions, and the so-called Hyde Amendment prohibited the use of welfare benefits for abortions. The Supreme Court ruled that the combination of the Hyde Amendment and pregnant women's indigency did not render unconstitutional this pursuit of the government's legitimate, though not compelling, interest in encouraging childbirth over abortion. The obstacle which the indigent women faced was not the Hyde Amend-

ment, but the women's indigency. The interest Indiana is pursuing in its hospitalization requirement is the protection of maternal health, an interest not only legitimate, but compelling. The *Harris v. McRae* reasoning applies *a fortiori* to Indiana's hospitalization requirement. The combination of the hospitalization requirement and the pregnant women's indigency does not render unconstitutional this pursuit of Indiana's legitimate, compelling, interest in protecting maternal health. The obstacle which the women face is not the hospitalization requirement, but the women's indigency. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Indiana regulation. The Indiana regulation does not impinge upon the fundamental right recognized in *Roe*.

It would be impractical for the constitutionality of a second trimester regulation to depend on a factual question, such as whether the regulation in fact reduced maternal morbidity and mortality. Interpreting *Roe* to require that second trimester regulations except specific types of abortions which may be safer than childbirth would require relitigation of the regulation's constitutionality with each change in the availability of abortions, with each improvement in abortion technique, and with each publication of statistics showing that abortion skills had improved. Such an interpretation of *Roe* would result in repeated relitigation of the constitutionality of the same statute. It is the policy of the Supreme Court to avoid, if possible, the creation of rules of law which increase litigation. *Roe* should not be given an interpretation which results in repeated relitigation of a statute's constitutionality. *Roe* does not render the constitutionality of second trimester regulations subject to either the availability of abortions or the improvements in medical techniques and skills.

The test for determining the constitutionality of statutes regulating second trimester abortions is not whether the

statute has the statistically demonstrable result of decreasing maternal morbidity or mortality for specific groups of abortions. Whether, as a matter of fact, it is statistically demonstrable that the regulation results in decreased maternal morbidity and mortality is a matter to be considered, but it is not the ultimate test. The ultimate test is a broader test: whether the legislature acted reasonably in determining that the regulation would promote maternal health. Furthermore, the statistics used to determine the reasonableness of a regulation would have to be the statistics not for a specific group of abortions, but for all the abortions to which the regulation applies. A statutory regulation of second trimester abortions is constitutional if it was reasonable for the state to conclude that the regulation would promote maternal health.

C.

It was reasonable for Indiana to conclude that the second trimester hospitalization requirement would promote maternal health.

Clearly, it is reasonable for a state to conclude that a hospitalization requirement will promote health. It cannot be seriously disputed that medical risks accompany abortions. It is therefore eminently reasonable to require that abortion be performed in a hospital. Hospitalization may be the most obviously reasonable health-related regulation that there is.[7] That is probably why the Supreme Court of the United States expressly stated that hospitalization would be a regulation reasonably related to maternal health. Indiana's determination that a hospitalization re-

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[7] Three Supreme Court Justices have even suggested that *Roe* might allow states to require hospitalization for first trimester abortions. *Sendak* v. *Arnold*, 428 U.S. 968 (1976) (Dissent by Justice White, with whom Chief Justice Burger and Justice Rehnquist joined.)

quirement would promote maternal health can be supported by reason. The statutory hospitalization requirement is reasonably related to maternal health. Accordingly, the statutory hospitalization requirement is constitutional. That was this Court's previous judgment in this case. A contrary ruling would controvert *Roe.*

III.

Even if the plaintiffs' legal theory was accurate, the plaintiffs would have failed to justify a preliminary injunction.

While this Court would be required to consider all relevant factors in deciding whether to exercise its discretion in favor of granting a preliminary injunction, the traditional standard for granting a preliminary injunction requires the petitioner to show (1) irreparable injury and (2) a likelihood of success on the merits. *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *National Tank Truck Carriers, Inc. v. Burke,* 608 F. 2d 819 (1st Cir. 1979); *Butler v. Goldblatt Bros., Inc.,* 589 F. 2d 323 (7th Cir. 1978); *Washington v. Walker,* 529 F. 2d 1062 (7th Cir. 1976).

The pregnant women present a clear case of potential irreparable injury. The petition for a preliminary injunction is brought on behalf of women in their second trimester of pregnancy who will allegedly be denied the opportunity to terminate their pregnancies if the challenged portions of the Indiana abortion statute are not held unconstitutional. A pregnancy unterminated will result in a child born, a result which is hardly reclaimable, hardly reparable. And since *Roe* holds that a fundamental right of privacy includes a fundamental right to an abortion, the birth of an unwanted child must be construed as irreparable "injury."

On the other hand, even if the plaintiffs' legal theory was accurate, they have failed to demonstrate a likelihood of success on the merits. There was presented no evidence sufficient to convince this Court that birth is more dangerous than early second trimester D & E abortions. The plaintiff, Dr. Lewis, testified that, in his opinion, a second trimester hospitalization requirement does not reasonably relate to maternal health. Tr. 61. He briefly elaborated on the basis of that opinion. Tr. 62-63. There was some somewhat confusing testimony by Dr. Lewis that the complication rate (a rate including both morbidity and mortality) was either 5.38/100 or 5.88/100 for D & E abortions performed from the thirteenth to the fifteenth week. Tr. 68-69. No comparable statistics for childbirth were given. Dr. Lewis testified that for the United States in 1972-1976 the D & E mortality rate was 7.6/100,000 for the thirteenth to fifteenth week and 13.2/100,000 for the sixteenth to twentieth week. Tr. 78. Defendant's Exhibit B is an affidavit of the Director of the Public Health Records Division of the Indiana State Board of Health, in which the Director states that the Indiana maternal death rate was 7.0/100,000 in 1977 and 10.8/100,000 in 1978. Dr. Lewis testified that the D & E current morbidity rates were lower than those for 1972-1976 because of improved medical practices. Tr. 77. To conclude on the basis of this evidence that early second trimester D & E abortions are safer than childbirth would require this Court to grant Dr. Lewis more credibility than this Court believes he deserves. Dr. Lewis is a plaintiff in this case with a significant pecuniary interest in the outcome. The evidence produced at the hearing was insufficient to persuade this Court that the plaintiff would likely succeed in proving birth more dangerous than an early second trimester D & E abortion.

Thus, even if the plaintiffs' legal theory was accurate, the plaintiffs would have failed to justify a preliminary injunction.

CONCLUSION

For the reasons stated in Part II, above, this Court's prior final judgment would be unaffected even if the plaintiffs could prove birth more dangerous than early second trimester D & E abortions. Accordingly, the plaintiffs' request for relief from the final judgment heretofore entered in this case is DENIED.

Enter 9/12/80

/s/ ROBERT A. SPRECHER
Robert A. Sprecher, Circuit Judge

/s/ JESSE E. ESCHBACH
Jesse E. Eschbach, District Judge

/s/ ALLEN SHARP
Allen Sharp, District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Decided September 14, 1976

[421 F.Supp. 734]

No. H 74-289

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., et al.,

Plaintiffs,

v.

OTIS BOWEN, et al.,

Defendants.

ORDER AND MEMORANDUM

PER CURIAM.

On May 29, 1975 this Court received from plaintiffs a motion for class action certification and determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure.

The Court now GRANTS plaintiffs' motion and orders this action to be continued as a class.

Further pursuant to *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 at 5203-5204 (July 1, 1976), this Court now enters a permanent injunction prohibiting defendants Bowen, Kowalczyk, Indiana State Board of Health, Paynter, and Sendak, their agents, assigns, successors and all others similarly situated, from enforcing Indiana Abortion Law, IC 1971, 35-1-58.5 (a)(2) (Burns Ind. Ann. Stat. § 10-108(a)(2)).

FACTS

On November 13, 1974 the plaintiffs filed their complaint challenging the constitutionality of certain provisions of the Indiana Abortion Law. IC 1971, 35-1-58.5 (Burns Ind. Ann.Stat. §§ 10-107 - 10-114). The plaintiffs were three pregnant women:

1. Brigitte Coe, who was in her third trimester of pregnancy at the time the complaint was filed. She alleged that the conditions and procedures required during the third trimester under the Indiana Statute are too restrictive.

2. Mary Roe, while in her second trimester of pregnancy sought to have an abortion performed at the Gary-Northwest Clinic. She was refused, however, by her physician since the Indiana Statute requires that abortions performed in the second trimester must be performed in a hospital. Indiana Abortion Law. IC 1971 35-1-58.5(b) (Burns Ind. Ann. Stat. § 10-108(b)).

3. Jane Doe, an unmarried minor, 16 years of age who sought an abortion without her parents' consent. She challenges the provision of the Indiana Abortion Law which requires parental consent where the woman is unmarried and is less than 18 years of age. Indiana Abortion Law, IC 1971, 35-1-58.5(a)(2) (Burns Ind. Ann. Stat. § 10-108 (a)(2)).

Plaintiffs requested a temporary restraining order, preliminary and permanent injunctions, prohibiting the defendants from enforcing the contested provisions of the Indiana Abortion Law and requested this Court to notify the Chief Judge of the United States Court of Appeals for the Seventh Circuit to convene a statutory three judge court to hear this issue.

On November 19, 1974 the Honorable Luther Swygert, Chief Judge of the United States Court of Appeals for the Seventh Circuit designated the Honorable Robert A. Sprecher, United States Circuit Judge for the Seventh

Circuit, and the Honorable Jesse E. Eschbach, United States District Judge for the Northern District of Indiana, to serve with the Honorable Allen Sharp as members of a three judge United States District Court.

On December 13, 1974 a hearing was held to consider the appropriateness of granting temporary relief. The Court treated plaintiffs' request as one for a preliminary injunction. On January 31, 1975 the three judge District Court found:

1. Brigitte Coe not entitled to injunctive relief.

2. Mary Roe not entitled to injunctive relief.

3. Jane Doe entitled to injunctive relief and issued an order preliminarily enjoining the defendant Indiana State Officials named in the caption from enforcing Indiana Abortion Law, IC 1971 35-1-58.5(a)(2) (Burns Ind. Stat. Ann. § 10-103(a)(2)).

On May 29, 1975 plaintiffs filed a motion for class action certification and determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure.

ANALYSIS AND CONCLUSIONS

In order to maintain a class action suit one must meet the requirements of Rule 23(a) and Rule 23(b) of the Federal Rules of Civil Procedure. Under Rule 23(a) the prerequisites to a class action are:

1. The class is so numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to the class.

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class, and

4. The representative parties will fairly and adequately project the interests of the class.

This Court is convinced that Jane Doe is an adequate representative of the class of unmarried pregnant women under 18 years of age. And further, this class clearly meets the requirements of Rule 23(a). In addition, this Court is convinced that plaintiff, Jane Doe, representative class also meets the prerequisite of Rule 23(b). Since it is likely that should this action be maintained separately by individual plaintiffs, inconsistent adjudications may result. Therefore, a class action suit is clearly "superior to other available methods for the fair and efficient adjudication of the controversy". Rule 23(b)(3).

Consequently, it is the determination of this Court that this action may properly be maintained as a class action and that Jane Doe is an adequate representative of the plaintiff class of unmarried pregnant women under 18 years of age.

Plaintiff, Jane Doe, challenges the Indiana Abortion Law provision requiring the consent of the unmarried woman's parent or other person *in loco parentis,* if such woman is under 18 years of age. This issue has recently been decided by the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 (July 1, 1976).

In *Danforth,* the Supreme Court held that states may not require the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy:

> "[t]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent.
>
> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are pro-

tected by the Constitution and possess constitutional rights. See *Breed v. Jones,* 421 U.S. 519 (1975); *Goss v. Lopez,* 419 U.S. 565 (1975); *Tinker v. Des Moines School District,* 393 U.S. 503 (1969); *In Re Gault,* 387 U.S. 1 (1967)." Id. at 5203-4.

Prior to this decision other courts reached similar results. See, *Poe v. Gerstein,* 517 F. 2d at 792; *Wolfe v. Schroering,* 388 F. Supp. at 636-637; *Doe v. Rampton,* 366 F. Supp. at 193, 199; *State v. Koome,* 84 Wash. 2d 901, 530 F. 2d 260 (1975).

It is therefore the decision of this Court, following the precedent set forth in *Danforth,* that the provision in the Indiana Abortion Law, IC 35-1-58.5(a)(2) Burns Ind. Stat. Ann. 10-108(a)(2), which requires the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy is unconstitutional. This Court now enters a permanent injunction prohibiting defendants Bowen, Kowalczyk, Indiana State Board of Health, Paynter, and Sendak, their agents, assigns, Successors, and all others similarly situated, from enforcing IC 35-1-58.5(a)(2), Burns Ind. Stat. Ann. § 10-108(a)(2).

Dated this 14 day of September, 1976.

/s/ Robert A. Sprecher, Circuit Judge

/s/ Jesse E. Eschbach
Jesse E. Eschbach, District Judge

/s/ Allen Sharp
Allen Sharp, District Judge

SEPARATE STATEMENT

I must concur in the order and judgment of this Court in accord with my apparent obligation to follow the precedents of our highest Court. I do so with the greatest reluctance. I write briefly to state the basis of that reluctance.

Over the strong protests of well-reasoned dissents our highest Court has now vested in a mother, regardless of age or parental or marital consent, the absolute right to terminate human life in a clearly identifiable form during the first three months of its existence, and to do so without regard to any particular medical procedure. *Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 901 (1976). From the end of the first trimester until viability, the state "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade,* 410 U.S. at 165 (1973). These decisions are based on the principle that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn." Id., at 158.

This result is articulated on the basis of a recently and judicially expanded constitutional right to privacy. This concept found its origin in no specific provision of a written constitution. The concept of privacy was generally a concept of tort law finding its origins in the 1890 Harvard Law Review under the authorship of Warren and Brandeis. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). It has now become a watery constitutional concept that can run in any direction chosen by at least five members of the highest Court. (See the various opinions in *Griswold v. Conn.,* 361 U.S. 479 (1965)). When such water tends to erode the basic right to life itself under the

Fourteenth Amendment, all members of the Judiciary, regardless of where they sit, should be extremely careful. This is manifestly an area for the greatest of judicial restraint.

As one who has been engaged both in the making and following of precedent this writer is well aware that our system presupposes the following of clear precedents by the lower levels of the judiciary. However, when the underlying values involve human life itself, I do not deem it an obligation to mechanically follow a questionable precedent without a stated concern. One of the basic ideas of Western thought has been the sacredness of human life at all stages. That right was apparently secularized in the Fourteenth Amendment. The right to life is the most fundamental human right. As the Supreme Court noted in another context, it is "the right to have rights." *Furman v. Georgia,* 408 U.S. 238, 290 (1972). Those ideas were apparently embodied in the Fourteenth Amendment's basic protections. Congressman John Bingham, who sponsored the Fourteenth Amendment in the House of Representatives, described the Amendment as having universal application and observed that it applied to "any human being." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). Senator Allen A. Thurman, commenting on the equal protection clause of the Fourteenth Amendment, stated that "[I]t covers every human being within the jurisdiction of a state. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794 (1875) (emphasis added). The Supreme Court has ruled that, whether or not the unborn child is a human being, he is not a person. *Roe v. Wade,* supra. This implicitly accepts the concept that innocent human beings can be declared non-persons and thereby deprived of constitutional protection. Given the nature of constitutional adjudication there will undoubtedly be pressures to extend this concept of non-persons. My

concept of the proper functioning of precedent has always included a hard look at precedents whose basis should be reexamined. See *Theis v. Heuer*, 149 Ind. App. 52, 270 N.E. 2d 764, —— Ind. ——, 280 N.E. 2d 300 (1971). This writer respectfully suggests that we ought to reexamine the denial of personhood to all unborn children.

In his classical dissent, Mr. Justice Frankfurter in *Baker v. Carr*, 369 U.S. at page 266, 330 (1962), suggested the Court was inviting itself into a political thicket. A most casual reading of the reported decisions of the Federal Judiciary since 1962 will easily demonstrate the accuracy of that prediction. One might also accurately predict that the Court has now invited itself into a medical and moral thicket. We cannot soon foresee our early extrication therefrom.

More than two decades ago Mr. Justice Jackson reminded us that the basic uniqueness of the highest Court is finality. (See concurring opinion of Jackson, J., in *Brown v. Allen*, 344 U.S. 443, 540 (1953)). That comment is most appropriate in the context of these cases. With the highest personal regard for those nine men, finality does not always insure wisdom. See *Dred Scott v. Sandford*, 19 Howard 393 (1857). It is therefore the right and obligation of all members of this constitutional society to concern themselves with the wisdom of decisions affecting the basics of life itself. I write here only to express one Judge's deepest concern for those basics.

Neither the courts nor the Legislature should limit by definition the concept of "persons" without the greatest soul searching. That process is at the heart of this brief statement.

Dated September 14, 1976.

/s/ Allen Sharp
Allen Sharp
Judge, United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. H 74-289

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., et al

v.

OTIS BOWEN, Governor of the State of Indiana, et al

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Robert A. Sprecher, Jesse E. Eschbach, & Allen Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged

This Court now enters a permanent injunction prohibiting defendants Bowen, Kowalczyk, Indiana State Board of Health, Paynter, and Sendak, their agents, assigns, Successors, and all others similarly situated, from enforcing IC 35-1-58.5(a)(2), Burns Ind. Stat. Ann. § 10-108(a)(2).

Dated at Hammond, Indiana, this 14th day of September, 1976.

/s/ FRANCIS T. GRANDYS
Clerk of Court

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-764

Decided January 25, 1977

[429 U.S. 1067]

OTIS BOWEN, et al.,

Appellants,

v.

GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., et al.,

Appellees.

Appeal From the United States District Court for the Northern District of Indiana

MEMORANDUM.

Judgment affirmed.

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APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hearing Held December 13, 1974

Decided January 31, 1975

[418 F.Supp. 9]

Civil No. H-74-289

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., et al.,

Plaintiffs,

v.

OTIS BOWEN, et al.,

Defendants.

ORDER OF JUDGMENT

PER CURIAM.

On November 13, 1974 plaintiffs filed this action seeking a temporary restraining order, declaratory judgment and preliminary and permanent injunctive relief against various Indiana officials charged with enforcement of the Indiana Abortion Statute; BURNS' IND. ANN. STAT. §§ 10-107-10-114. A three-judge court was convened. On December 13, 1974 a hearing was held to consider the appropriateness of granting temporary relief. The defendants were advised, present and allowed to participate in the hearing, and we therefore treat plaintiffs' request as one for a preliminary injunction.

Plaintiffs are the Gary-Northwest Indiana Women's Services, Inc., Dr. William R. Lewis, and three pregnant women —Brigitte Coe, Mary Roe, Jane Doe. The defendants are

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state and county officials charged with the enforcement of the Indiana abortion statute.[1] Jurisdiction is alleged to be based on 28 U.S.C. §§ 1343, 1331. We consider the request for preliminary relief of each of the three women separately.[2]

Brigitte Coe

Brigitte Coe at the time the complaint was filed was in the third trimester. She alleged that it was her treating physician's professional medical judgment that an abortion was necessary to prevent a substantial permanent impairment of her life and mental health. Plaintiff Coe alleges that restrictions as to what conditions and what procedures may be used during the third trimester are too restrictive. She challenges the following portions of the statute:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> • • • • • • • • •
>
> (c) After viability of the fetus for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • • • • • • • •
>
> (2) Prior to the abortion the attending physician shall certify in writing to the hospital in which the

---

[1] The defendants are the Governor, Lake County prosecutor, Executive Officer of Indiana State Board of Health, State Attorney General and their agents and representatives.

[2] Although *Friendship Medical Center, Ltd. v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974), held that a physician has standing to challenge certain abortion regulations, we believe that in these cases the plaintiff-physician has not made a sufficient showing of irreparable injury to entitle him the requested injunctive relief where his patient for some reason is not entitled to injunctive relief.

abortion is to be performed that in his professional medical judgment, after proper examination and review of the woman's history, the abortion is necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman. All facts and reasons supporting said certification shall be set forth by the physician in writing and attached to said certificate.

(3) The saline method of abortion shall not be used.

Burns' Ind.Ann.Stat. § 10-108(c).

At the hearing, the court was informed that plaintiff Coe had received an abortion in another state. Without deciding whether plaintiff Coe no longer has standing to seek further relief or whether she may serve as a named plaintiff for a class of women similarly circumstanced, we hold that her request for a preliminary injunction should be denied.

It is uncontroverted that a preliminary injunction should not issue unless the plaintiff has made a showing of likelihood of prevailing on the merits and that without such relief they will be irreparably injured. 7 J. Moore, Federal Practice ¶ 65.04[1]. In the present case it is quite clear that plaintiff cannot sustain her burden of showing irreparable injury. Since the issuance of equitable relief would be a futile effort as regards plaintiff Coe, her request for a preliminary injunction is denied. *Manion v. Holzman,* 379 F.2d 843 (7th Cir.), *cert. denied,* 389 U.S. 976, 88 S.Ct. 479, 19 L.Ed.2d 470 (1967).

Mary Roe

Mary Roe was first seen by Dr. Lewis on September 18, 1974. She was at that time approximately 16-18 weeks pregnant. She was then in excellent health and sought to have an abortion performed at the Gary-Northwest Clinic. Dr.

Lewis refused her request for an abortion because she was in her second trimester and the Indiana abortion statute provided:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> • • • • • • • • •
>
> (b) After the first trimester of pregnancy and before viability, for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • • • • • • • •
>
> (2) It is performed in a hospital.

Burns' Ind.Ann.Stat. § 10-108(b).

Plaintiff Roe challenges the hospital requirement for second trimester abortions. The court has determined that a preliminary injunction on her claim should not issue.

In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court held that from and after the first trimester that a state could regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163, 93 S.Ct. at 732. The Supreme Court went on to say:

> Examples of permissible state regulation in this area [maternal health] are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status;* as to the licensing of the facility; and the like.

Id. (emphasis added).

Whether a hospital requirement for the second trimester per se comports with a "reasonable regulation" standard is not certain and need not be decided at this point. But at the very least in instances where a preliminary injunction is sought and the plaintiff bears the burden of showing a likelihood of ultimately prevailing, the foregoing language of the Court is sufficient grounds for denying the requested preliminary relief.

Jane Doe

Jane Doe, a resident of Gary, Indiana, is an unmarried minor 16 years of age who seeks an abortion in the State of Indiana. Plaintiff Doe first went to see Dr. Lewis at the Gary-Northwest Clinic during the beginning of October 1974. At that time she was approximately 6-8 weeks pregnant and in excellent health. At the time of the hearing in this matter she was approximately 17-19 weeks pregnant.

Plaintiff Doe challenges the provision of the Indiana Abortion Law that provides:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> (a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • • • • • • • •
>
> (2) The woman submitting to the abortion has filed her consent with said physician. If said woman is unmarried and is less than eighteen [18] years of age, said consent shall be joined by a parent or other person in loco parentis . . . . Burns' Ind.Ann.Stat. § 10-108(a).

While it is true that the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), specifi-

cally refused to consider whether parental consent statutes were constitutional, *Id.* at 165 n. 67, 93 S.Ct. 705, there is increasing authority for the proposition that such provisions are invalid. *Coe v. Gerstein*, 376 F.Supp. 695 (S.D. Fla.1974) (3 judge court) *appeal docketed*, No. 73-1157, 42 U.S.L.W. 3441 (U.S. January 28, 1974); *In the Matter of P.J.*, 12 Cr.L.Rptr. 2549 (D.C.Super.Ct., February 6, 1973);[3] *cf. In re Smith*, 16 Md.App. 209, 295 A.2d 238 (1972), *Ballard v. Anderson*, 4 Cal.3d 873, 95 Cal.Rptr. 1, 484 P.2d 1345 (1971).

In *In the Matter of P. J., supra*, the court ruled that the mere status of minority should not render a person incompetent to make an abortion decision. The court ruled that a 17 year old be permitted to have an abortion despite the objection of her mother, who had cared for her daughter's first child.

In *Coe v. Gerstein, supra*, the court held unconstitutional a Florida statute requiring parental consent for minors under 18 years of age before an abortion could be performed. The court said:

> We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of parents . . . .
>
> • • • • • • • • •
>
> The failure of the Florida ". . . parental consent" requirement is that it gives to . . . parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a . . . parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so.

---

[3] *See generally Note, The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 Va.L.Rev. 305 (1974).

> As we learn from *Roe v. Wade, supra*, the State has no authority to interfere with a woman's right of privacy in the first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to . . . parents an authority the State does not possess.
>
> We do not learn from the opinion in *Roe v. Wade, supra,* the age of plaintiff Roe, the pregnant woman who enjoyed the "fundamental", "*personal* right of privacy" [emphasis supplied] recognized by the Supreme Court. *But we do know that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to "fundamental", "personal", constitutional rights.*

376 F.Supp. at 697-98 (emphasis added).

Furthermore, plaintiff alleges that the Indiana statute unreasonably discriminates against unmarried females under 18 years of age where the marital status of the individual should be of no significance. Since at present there is no requirement that we know of in Indiana that a husband or anyone else give their consent before a minor wife may obtain an abortion, plaintiffs may ultimately be able to show that the line drawn between two similar classes of women by the Indiana legislature serves no valid purpose.

Findings of Fact and Conclusions of Law

1. Brigitte Coe, because her pregnancy has already been aborted, is not entitled to injunctive relief because she has failed to satisfy the court that a denial of such relief will cause her irreparable injury.

2. Mary Roe was at the time this action was filed in her second trimester. The court finds that the plaintiff Roe has

first failed to establish that the Indiana hospital requirement for second trimester abortions is unreasonable and thereby inconsistent with the Supreme Court's holding in *Roe* and therefore has not convinced the court that she has a substantial likelihood of success on the merits. Accordingly, her request for injunctive relief is denied.

3. Jane Doe is an unmarried minor 16 years of age who desires an abortion and does not have the consent of either parent as required by Burns' Ind.Ann.Stat. § 10-108(a)(2). At the time of the hearing in this cause she was approximately 17-19 weeks pregnant. Plaintiff Doe has convinced this court that (1) unless granted the preliminary relief requested she will suffer irreparable and immediate injury, and (2) that there is a substantial likelihood that she will eventually be successful on the merits. Therefore, the court will issue an order preliminarily enjoining the defendant Indiana State officials named in the caption from enforcing against plaintiffs that portion of Burns' Ind.Ann.Stat. § 10-108(a)(2) which requires that an unmarried woman under 18 years of age obtain the consent of a parent before being able to procure an abortion.

Dated this 31st day of January, 1975.

/s/ ROBERT A. SPRECHER
Robert A. Sprecher
United States Circuit Judge

/s/ JESSE E. ESCHBACH
Jesse E. Eschbach
United States District Judge

ALLEN SHARP
United States District Judge

SEPARATE STATEMENT

Since ROE v. WADE, 410 U.S. 113 (1973), does not explicitly decide the question of parental consent to an abortion for a minor, I would reserve that question for a full determination here on the merits, rather than on a preliminary injunction.

Enter: January 31, 1975

/s/ ALLEN SHARP
Allen Sharp
Judge, U.S. District Court

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Filed October 14, 1980

No. H74-289

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., et al.,

Plaintiffs,

v.

OTIS BOWEN, et al.,

Defendants.

NOTICE OF APPEAL

The Plaintiffs, the GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC., WILLIAM R. LEWIS, M.D., JANE DOE, MARY ROE, BRIGITTE COE, and all others similarly situated, pursuant to Rule 10 hereby Appeal to the SUPREME COURT OF THE UNITED STATES from a final MEMORANDUM AND ORDER entered in this proceeding by a three Judge District Court on September 12, 1980.

This Appeal is taken pursuant to Title 28, United States Code Annotated, Section 1253.

Dated: October 10, 1980.

/s/ JULIAN B. WILKINS
Attorney for Appellants

LAFONTANT, WILKINS & BUTLER
69 West Washington Street #1423
Chicago, IL 60602
263-4882

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APPENDIX G

Abortion: Need, Services and Policies, Indiana, The Alan Guttmacher Institute 2-3, 39 (1979)

SUMMARY OF FINDINGS

- In 1977, there were an estimated 40,430 women in need of abortion services living in Indiana.
- Of these women, 33 percent were teenagers, 33 percent were 20-24 and 35 percent, 25 or older; 80 percent were white and 20 percent were nonwhite.
- There were 10,400 abortions reported in Indiana in 1977; 99 percent of these were obtained by Indiana residents and one percent were obtained by residents of other states.
- Most women obtaining abortions in Indiana were young (69 percent were under 25), unmarried, childless and in the first trimester of pregnancy at the time of abortion.
- Altogether, 21,790 Indiana residents obtained abortions in 1977 in the state or in another state. Thus, almost 54 percent of Indiana women in need of abortion services obtained them, about 25 percent in the state and about 23 percent in another state. Some of these women had to travel long distances to obtain abortion services.
- Seventy-five percent of women in need were unable to obtain abortion services in Indiana.
- The abortion occurrence rate in 1977 in Indiana was 8.7 abortions per 1,000 women of reproductive age (15-44).
- Approximately 5,600 Indiana women eligible for Medicaid-funded health care were in need of abortion services in FY 1977.

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- During FY 1977, no abortions were funded by Medicaid in Indiana. For non-Medicaid-eligible women, the resident abortion rate was 15.3 per 1,000.
- Indiana funds abortion services for Medicaid-eligible women only under extremely restricted circumstances.
- Provision of abortion services is heavily concentrated in the state's metropolitan areas. Some 91 percent of the women in need in nonmetropolitan counties lived in counties where there were no identified service providers; 35 percent of metropolitan women in need lived in counties with no services. The Indianapolis SMSA, with 24 percent of the need, accounted for 82 percent of all abortions.
- The majority of the abortions in the state in 1977 (77 percent) were performed in four nonhospital clinics and physicians' offices; 23 percent occurred in hospitals.
- Abortion services were available in only 16 of the state's 99 hospitals: in eight of the 58 public hospitals and in eight of the 41 private hospitals.
- Indiana ranks extremely low among the states in availability of abortion services. Only 13 of the state's 92 counties had abortion providers reporting at least one abortion in 1977 or in the first quarter of 1978. Of the 79 counties with no identified abortion services, 63 had 100 or more women in need in 1977; 13 of these had more than 400. In addition, there were 12 counties which had abortion service providers but in which fewer than half of the women in need were served.
- The rate of abortion in Indiana is lower than that in the United States as a whole. In 1977 Indiana was less successful in meeting abortion need than was generally the case in the country.

Area	Abortions per 1,000 women 15-44	Abortions per 1,000 births	Percent of abortion need met
United States	26.9	400.2	72
Indiana	8.7	126.2	26

- The characteristics of women obtaining abortions in the state differed slightly from those of comparable women in the United States as a whole. Indiana women were younger and more likely to be having their first abortion.

Area	Percent <20 years	Percent unmarried	Percent having first abortion
United States	31	76	77
Indiana	35	76	82

Map 2. Percentage of need served (reported abortions by occurrence and need by residence)† in 1977 in counties with identified abortion service provision, Indiana.

APPENDIX H

Abortion in the United States, 1977-78
(from Family Planning Perspectives)*

Volume 11, Number 6, November/December 1979

In 1977, 95 percent of the 1.32 million abortions performed occurred in metropolitan areas where 75 percent of those in need of services lived; 28 percent of women in need of abortions were unable to obtain them; 31 percent of all abortions were obtained by teenagers; 77 percent, by unmarried women.

By Jacqueline Darroch Forrest, Ellen Sullivan and Christopher Tietze

Jacqueline Darroch Forrest is Director of Research and Ellen Sullivan is Research Associate at The Alan Guttmacher Institute. Christopher Tietze is Senior Consultant with The Population Council and directs its abortion research activities.

Summary

• There were 1.32 million legal abortions in the United States in 1977 and a projected 1.37 million in 1978, an increase of four percent between 1977 and 1978 compared with one of 12 percent between 1976 and 1977.

• In 1978, 29 percent of pregnant women chose to terminate their pregnancies by abortion.

• Almost three percent of U.S. women of reproductive age obtained an abortion in 1978.

• From 1967 through 1978, approximately six million women obtained almost eight million legal abortions; about one in eight U.S. women of reproductive age has had a legal abortion.

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* Paragraphs from the study not material to the issues on this appeal have been deleted.

• The number of hospitals reporting that they provided abortion services dropped slightly from 1,695 in 1976 to 1,661 in 1977, but the number of nonhospital abortion clinics increased from 448 to 522, and the number of physicians who reported performing abortions in their offices grew from 424 to 533.

• Between 1976 and 1977, the average number of abortions per hospital facility decreased from 246 to 237, while the average number per nonhospital provider increased from 875 to 879.

• The percentage of abortions performed in hospitals declined from 35 in 1976 to 30 in 1977, while the percentage reported by free-standing clinics increased from 61 to 66; the percentage performed in physicians' offices remained at four.

• Ninety-five percent of abortions in 1977 occurred in metropolitan areas, where 75 percent of the women in need of abortion services live.

• In 1977, there were identified abortion providers in only 23 percent of U.S. counties.

• Nine percent (more than 118,000) of the women who obtained abortions in 1977 had to travel to another state for services, and many traveled to other, often distant, counties in their home states.

• One in three abortions in 1977 were obtained by teenagers, and three in four were obtained by unmarried women.

• Twenty-eight percent of the women estimated to be in need of abortion services in 1977, and 26 percent in 1978, were unable to obtain them.

• In FY 1977, before Hyde amendment restrictions on government financing of abortions for poor women, 133,000 of the estimated 427,000 Medicaid-eligible women in need of

publicly funded abortion services were unable to obtain them.

• In 1978, the number of abortions federally funded through Medicaid was about one percent of the number paid for before the Hyde amendment restrictions.

• Ten states and the District of Columbia have official policies to pay for most abortions for poor women. In addition, 12 states do so under court order.

These are among the principal findings of The Alan Guttmacher Institute's fifth annual survey of health institutions and private physicians providing abortion services in the United States. This survey, fielded in the summer of 1978, collected information on the number of abortions performed by each provider in 1977 and the first quarter of 1978.

• • • • • • • • • •

In 1978, there were 406 abortions for every 1,000 live births* (see panel 4, Table 1). Twenty-nine percent of pregnant women† terminated their pregnancies by abortion in 1978, compared with 19 percent in 1973 (see panel 5, Table 1).

The number of women in need of abortion services [1] who were unable to obtain them has decreased since 1973, as legal abortion services have become more available. In 1978, however, at least 479,000 women—26 percent of those estimated to be in need—were unable to obtain the abortion services they wanted (see panel 6, Table 1). (See page 333 for a discussion of the estimated need for abortion services.) Panel 7 of Table 1 indicates that only 16 percent of the need for abortion services was met in nonmetropoli-

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* Births mid-1978 to mid-1979.

† Excluding women whose pregnancies ended in miscarriage or stillbirth.

tan areas, compared to 94 percent in metropolitan communities. This disparity reflects the fact that abortion services are not available in most nonmetropolitan counties. However, many nonmetropolitan-area women travel to metropolitan counties to obtain abortions, so the actual proportion of the need that is met is understated for nonmetropolitan-area women and overstated for women who live in metropolitan areas.

From 1967 through 1978, some 6.3 million women obtained about 7.9 million legal abortions; 5.1 million women obtained abortions between 1973 and 1978. One in every eight women of reproductive age in the United States has had at least one legal abortion since 1967.

• • • • • • • • • • •

Abortion occurrence rates in 1977 ranged from a low of 5.2 per 1,000 in Mississippi to a high of 46.0 in New York.* Residence abortion rates ranged from a low of 10.2 per 1,000 in Arkansas and 10.3 in Utah to a high of 42.3 in New York. As a result of women's traveling to other states for abortion services, the range for residence abortion rates is smaller than for occurrence rates. States with the lowest occurrence rates have higher residence than occurrence rates, and states that provide abortion services to substantial numbers of nonresident women have lower residence than occurrence rates.

In addition to the estimated 118,430 women who had to travel outside their home states for abortion services, many women who obtained in-state abortions traveled outside

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* The exceptionally high abortion rates in the District of Columbia—occurrence rate, 176, residence rate, 83—reflect both the large number of nonresident women coming into the urban District for abortion services (54 percent of all abortions were to nonresidents) and its unusual concentration of young, black and unmarried women, groups which traditionally have the highest abortion rates.

their home counties for that service—often for long distances and at considerable expense. It has been shown that when distance to the nearest abortion provider is substantial, women are less likely to obtain the abortion services they need.[3] Those that do travel tend to obtain the abortion at a later, riskier period of gestation.[4] In 1977 in New York City, nine percent of resident abortions occurred at 13 or more weeks' gestation, compared with 18 percent of the abortions provided to nonresidents.[5] Distance also makes rapid diagnosis and treatment of post-abortion complications difficult.

In 1977, abortion service providers were identified in 718 of the 3,105 U.S. counties, an increase of 20 counties since 1976. Nevertheless, in 1977, there remained 2,387 counties—77 percent of all U.S. counties—that had no identified provider (see Table 3). Only Delaware, Hawaii and the District of Columbia had providers in every county. In 35 states, more than half the counties had no identified abortion services.

Of the estimated 1.8 million women in need of abortion services in 1977 (see page 333), nearly one-half million (26 percent) lived in counties that had no identified provider. In 11 states and the District of Columbia, fewer than 10 percent of the women in need lived in counties with no abortion services;† in 15 states, more than half of all women in need lived in unserved counties.‡ In 1977, the number of women in need of abortion services living in counties with no abortion provider ranged from fewer than 1,000 in Connecticut, Nevada, Oregon and Vermont to more

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† California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon and Washington.

‡ Arkansas, Idaho, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota and West Virginia.

Table 3. Number of counties and number and percentage with no identified abortion service provider; estimated number of women in need of abortion services and percentage living in counties with no identified abortion service provider; by state, 1977

State	Counties			Women in need (000s)		
	Total no.	With no provider		Total no.	In counties with no provider	
		No.	%		No.	%
Total	*3,105*	*2,387*	*77*	*1,825.9*	*481.2*	*26*
Ala.	67	54	81	37.7	16.9	45
Alaska	29	23	79	4.3	1.5	36
Ariz.	14	11	79	19.6	5.3	27
Ark.	75	68	91	19.4	12.6	65
Calif.	58	11	19	180.8	1.6	1
Colo.	63	43	68	20.9	2.1	10
Conn.	8	1	13	22.5	0.9	4
Del.	3	0	0	5.4	0.0	0
D.C.	1	0	0	12.8	0.0	0
Fla.	67	41	61	72.4	10.6	15
Ga.	159	140	88	54.1	26.4	49
Hawaii	4	0	0	13.0	0.0	0
Idaho	44	35	80	5.9	3.7	62
Ill.	102	85	83	97.3	23.8	24
Ind.	92	79	86	40.4	20.8	51
Iowa	99	83	84	19.1	11.2	59
Kans.	105	91	87	16.7	6.6	39
Ky.	120	112	93	26.4	16.8	64
La.	64	61	95	42.7	27.2	64
Maine	16	6	38	7.2	1.2	16
Md.	24	8	33	41.8	3.8	9
Mass.	14	2	14	42.8	1.0	2

Table 3—Continued

State	Counties			Women in need (000s)		
	Total no.	With no provider		Total no.	In counties with no provider	
		No.	%		No.	%
Mich.	83	57	69	77.7	17.5	22
Minn.	87	82	94	27.2	15.0	55
Miss.	82	76	93	27.8	21.5	77
Mo.	115	107	93	38.1	16.9	44
Mont.	57	51	89	5.8	3.1	53
Nebr.	93	90	97	11.2	5.7	51
Nev.	17	14	82	5.0	0.8	16
N.H.	10	3	30	5.5	2.2	40
N.J.	21	5	24	60.4	4.8	8
N. Mex.	32	20	63	10.3	3.5	34
N.Y.	62	6	10	152.3	1.6	1
N.C.	100	29	29	56.2	5.2	9
N. Dak.	53	51	96	4.9	4.1	85
Ohio	88	76	86	85.5	33.2	39
Okla.	77	71	92	22.1	13.3	60
Oreg.	36	11	31	16.3	0.7	4
Pa.	67	26	39	89.7	9.4	10
R.I.	5	4	80	6.3	2.4	38
S.C.	46	37	80	33.2	19.9	60
S. Dak.	67	66	99	5.2	4.6	88
Tenn.	95	80	84	37.5	14.8	39
Tex.	254	220	87	108.7	34.0	31
Utah	29	26	90	9.3	4.4	48
Vt.	14	5	36	3.2	0.6	18
Va.	98	80	82	49.4	19.2	39
Wash.	39	12	31	25.8	1.8	7
W. Va.	55	50	91	12.7	9.4	74
Wis.	72	61	85	32.8	16.5	50
Wyo.	23	17	74	3.0	1.3	43

than 20,000 in Georgia, Illinois, Indiana, Louisiana, Mississippi, Ohio and Texas.§

Need for Abortion Services

The uneven availability of abortion services within and among states is reflected by the 77 percent of U.S. counties that had no identified service provider; by the 118,430 women who had to travel to another state to obtain abortions; and by the large areal differences in abortion rates. Based on the six states with the highest residence abortion rates in 1976, it was estimated that in that year, there were 1,791,000 women in need of abortion services, that is, women who wanted to terminate their pregnancies by abortion and who would use abortion services if they were available.[6] The assumption underlying the need estimate was that of all the states, these six had the best abortion service availability and accessibility (either within the state or in nearby states), and that the average of their residence abortion rates represented levels of abortion use that would probably occur in other, less well served areas if abortion service availability and accessibility were expanded.

The average abortion rates in these states in 1976 for six age and racial subgroups were applied to population estimates of women by age and race in 1977 and 1978, in order to arrive at estimates of the total number of women who were in need of abortion services—1,825 870 women in 1977 and 1,853,000 in 1978.

To be conservative, the six-state average resident abortion rates by age and racial subgroups were used as the standard for estimating the number of women in need of abortion services throughout the country. In 1976, California and New York—two of the six states—had slightly

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§ Detailed discussion of abortion need and service patterns in each state is contained in 50 state abortion profiles that are being published by the AGI (see reference 10).

Abortion Providers

The number of facilities reporting at least one abortion during the survey period increased by 149 to 2,716 in 1977 (see Table 6 on page 337). This net gain was the result of an increase of 183 in nonhospital providers (from 448 to 522 clinics and from 424 to 533 physicians performing abortions in their offices) and a decrease of 34 in the number of hospital providers. The decrease was due to a number of factors. In all, 146 hospitals identified as abortion service providers in the 1976-1977 survey did not report having provided abortions in the 1977-1978 survey. Of these, 26 hospitals closed, 80 remained open but reported no abortions during 1977-1978, and 40 others did not respond to the survey. On the other hand, 112 new hospital providers appeared in the 1977-1978 survey; 32 were newly identified abortion service providers, and 80 that did not respond in 1976-1977 reported providing abortions in 1977-1978.

Between 1976 and 1977, the proportion of providers that were nonhospital facilities increased from 34 percent to 39 percent. The shift occurred in both metropolitan and nonmetropolitan areas. Nonhospital providers consist of freestanding abortion clinics, generally with large caseloads (the average is over 1,600 per year), and physicians who perform abortions in their offices (averaging fewer than 100 abortions per year). Between 1976 and 1977, the average number of abortions per hospital facility decreased from 246 to 237, while the average number per nonhospital provider increased from 875 to 879.

As Figure 2 on page 339 illustrates, facilities that reported more than 1,000 abortions in 1977, representing only 13 percent of all providers, were responsible for 71 percent of all abortions. In contrast, 49 percent of all providers reported 100 or fewer abortions in 1977 (that is, an average of fewer than two per week), and were responsible for only three percent of all abortions. Almost one-third of these

Table 4. Number and percentage distribution of legal abortions, by selected characteristics, 1973–1977

Characteristic	No.					% distribution				
	1973	1974	1975	1976	1977	1973	1974	1975	1976	1977
Total	**744,610**	**898,570**	**1,034,170**	**1,179,300**	**1,320,320**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**
Age										
<15	11,630	13,420	15,260	15,820	15,690	1.6	1.5	1.5	1.3	1.2
15–19	232,440	278,260	324,930	362,689	397,720	31.2	31.0	31.4	30.8	30.1
20–24	240,610	286,600	331,640	392,280	450,900	32.3	31.9	32.1	33.3	34.2
25–29	129,600	162,690	188,900	220,500	247,360	17.4	18.1	18.2	18.7	18.7
30–34	72,550	89,810	100,170	110,050	124,720	9.7	10.0	9.7	9.3	9.4
35–39	40,960	48,770	52,740	56,720	61,870	5.5	5.4	5.1	4.8	4.7
≥40	16,820	19,000	20,530	21,250	22,060	2.3	2.1	2.0	1.8	1.7
Race										
White	548,790	629,320	701,170	784,890	891,220	73.7	70.0	67.8	66.6	67.5
Black and other	195,820	269,250	333,000	394,410	429,100	26.3	30.0	32.2	33.4	32.5
Marital status										
Married	216,210	248,150	271,870	290,030	300,530	29.0	27.6	26.3	24.6	22.8
Unmarried*	528,400	650,420	762,300	889,270	1,019,790	71.0	72.4	73.7	75.4	77.2
No. of living children										
0	375,240	444,120	499,320	562,610	663,100	50.4	49.4	48.3	47.7	50.2
1	137,400	173,190	206,790	244,430	269,090	18.5	19.3	20.0	20.7	20.4
2	102,160	129,200	156,840	181,520	194,520	13.7	14.4	15.2	15.4	14.7
3	61,850	75,150	86,820	97,690	99,980	8.3	8.4	8.4	8.3	7.6
4	33,680	36,910	43,830	47,930	49,200	4.5	4.3	4.2	4.1	3.7
5	34,480	39,000	40,570	45,120	44,330	4.6	4.3	3.9	3.8	3.4

Prior induced abortions										
0	u	782,060	822,060	911,320	969,380	u	84.8	79.5	77.3	73.4
1	u	112,550	170,440	213,240	268,570	u	12.5	16.5	18.1	20.3
2	u	17,110	30,400	40,400	55,400	u	1.9	2.9	3.4	4.2
3	u	6,850	11,250	14,340	6,970	u	0.8	1.1	1.2	2.1
Weeks of gestation										
≤8	284,280	399,380	480,600	559,900	659,660	38.2	44.5	46.5	47.4	50.0
9–10	221,550	256,500	290,370	333,770	362,160	29.7	28.5	28.1	28.3	27.4
11–12	130,630	134,930	151,120	171,270	179,990	17.5	15.0	14.6	14.5	13.6
13–15	44,360	43,930	45,910	49,010	52,260	6.0	4.9	4.4	4.2	4.0
16–20	53,340	53,680	56,240	55,120	54,260	7.2	6.0	5.4	4.7	4.1
≥21	10,450	10,150	9,930	10,230	11,990	1.4	1.1	1.0	0.9	0.9
Method										
Curettage†	667,720	804,640	948,560	1,101,420	1,239,620	89.7	89.5	91.7	93.4	93.9
Saline infusion	66,610	81,370	59,700	56,230	53,800	8.9	9.1	5.8	4.8	4.1
Hysterotomy/ hysterectomy	4,120	5,030	3,560	2,680	2,270	0.6	0.6	0.3	0.2	0.2
Other‡	6,160	7,530	22,350	18,970	24,630	0.8	0.8	2.2	1.6	1.8

*Never married, separated, divorced, widowed.

†Suction and sharp curettage; also includes D&E (dilatation and evacuation at 13 weeks' gestation and later).

‡Includes prostaglandin, urea, etc.

Note: In this and subsequent tables, u = unavailable.

Sources: Number of abortions from AGI abortion surveys 1973–1977; characteristics from the CDC's annual abortion surveillance summaries for 1973 to 1977, with adjustments for changes in states reporting data to the CDC each year. In addition, one-half the difference in number of abortions reported to the AGI and the CDC has been apportioned clinics and physicians' offices; these abortions are assumed to have been performed at 12 weeks' gestation or less, by curettage. Abortions to New York City residents have been included in the calculation of abortions by the number of prior induced abortions. As a result of these adjustments, figures for 1973–1975 are slightly different from those published previously.

providers—15 percent of the total number—reported fewer than five abortions in any quarter in 1977 (not shown).

In 1977, 70 percent of all reported abortions were performed in nonhospital facilities, compared with 65 percent in 1976 (see Table 6); the percentage performed in physicians' offices remained steady at about four, while the percentage performed in clinics increased from 61 to 66 (not shown). Hospital facilities accounted for a larger proportion of providers in nonmetropolitan areas than in metropolitan areas (77 percent compared with 57 percent), and for a larger proportion of abortions (38 percent compared with 29 percent). But, even in nonmetropolitan areas, nonhospital facilities accounted for six out of every 10 reported abortions.

As may be seen in Figure 3 on page 340, the number of abortions performed in hospital facilities increased in the first quarter of each year from 1973 to 1975 and then began to decline. By 1978, the number had fallen to 92 percent of the 1973 level. In metropolitan areas, the Q1 1978 hospital level was just 90 percent of the Q1 1973 level; the number of hospital abortions in nonmetropolitan areas increased between 1973 and 1977, but fell in 1978.

Overall, the number of public and private hospital providers decreased between 1976 and 1977, but the number of nonmetropolitan private hospitals providing abortion services actually increased slightly, from 256 to 264 (see Table 7 on page 338). In 1977, as in 1976, just 31 percent of short-term general non-Catholic hospitals (20 percent of public hospitals and 37 percent of private hospitals) provided abortion services. In metropolitan areas, 37 percent of public hospitals and 50 percent of private hospitals provided abortions in 1977. In nonmetropolitan areas, however, only 12 percent of public hospitals and 19 percent of private hospitals reported any abortions.

A total of 3,747 short-term general non-Catholic hospitals (1,644 public and 2,103 private) did not provide any abortion services in 1977 (see Table 8 on page 339). Sixty-five percent of the nonprovider hospitals (76 percent of the public hospitals and 56 percent of the private hospitals) were located in counties that had no identified hospital, clinic or physician's office that reported performing any abortions.

The 48 states with any unserved counties all had nonprovider hospitals in some of these counties. All but five of these states (Connecticut, Massachusetts, New Jersey, New York and Vermont) had at least one nonprovider public hospital located in unserved counties. There were over 50 nonprovider public hospitals in unserved counties in nine states.* In seven of these nine states, fewer than 10 percent of the public hospitals reported any abortions. None of the 110 public hospitals in seven states were abortion service providers.†

There were nonprovider private hospitals in unserved counties of all states but Nevada. (Delaware, the District of Columbia and Hawaii had no unserved counties.) None of the 62 private hospitals in North Dakota and South Dakota provided abortion services; 58 of these were located in counties with no identified provider.

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* Alabama, Georgia, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Oklahoma and Texas.

† Delaware, Louisiana, New Hampshire, North Dakota, Rhode Island, South Dakota and Vermont.

Table 8. Number of short-term general non-Catholic hospitals, number providing no abortion services, and number located in counties with no identified abortion service provider, by type of administrative control; according to state, 1977

State	All hospitals			Public			Private		
	Total	Nonproviders		Total	Nonproviders		Total	Nonproviders	
	No.	Total No.	In counties with no provider	No.	Total No.	In counties with no provider	No.	Total No.	In counties with no provider
Total	**5,408**	**3,747**	**2,433**	**2,064**	**1,644**	**1,245**	**3,364**	**2,103**	**1,188**
Ala.	126	112	78	80	73	58	46	39	20
Alaska	21	14	8	14	12	7	7	2	1
Ariz.	69	57	34	25	21	14	44	36	20
Ark.	82	73	62	50	45	40	32	28	22
Calif.	511	135	11	141	59	9	370	76	2
Colo.	71	38	27	34	20	16	37	18	11
Conn.	34	11	2	6	5	0	28	6	2
Del.	8	3	0*	2	2	0*	6	1	0*
D.C.	12	4	0*	3	1	0*	9	3	0*
Fla.	203	144	45	79	59	28	124	85	17
Ga.	156	125	105	116	92	88	40	33	17
Hawaii	19	5	0*	9	4	0*	10	1	0*
Idaho	42	36	29	33	28	22	9	8	7
Ill.	190	145	93	49	46	35	141	99	58
Ind.	99	83	73	58	50	44	41	33	29
Iowa	114	100	85	69	63	59	45	37	26
Kans.	130	113	101	64	60	54	66	53	47
Ky.	97	89	74	32	28	23	65	61	51
La.	127	126	105	72	72	65	55	54	40
Maine	45	26	10	4	3	1	41	25	9
Md.	50	18	7	12	7	2	38	11	5
Mass.	104	57	3	15	10	0	89	47	3
Mich.	190	145	78	56	50	26	134	95	52
Minn.	148	135	116	82	79	75	66	56	41
Miss.	102	95	84	78	73	66	24	22	18
Mo.	131	119	84	53	49	40	78	70	44
Mont.	55	50	43	17	16	13	38	34	30
Nebr.	92	86	76	44	42	38	48	44	38
Nev.	20	13	8	14	11	8	6	2	0
N.H.	27	21	8	3	3	1	23	18	7
N.J.	91	44	11	8	5	0	83	39	11
N. Mex.	43	28	16	19	12	5	24	16	11
N.Y.	275	77	9	50	22	0	225	55	9
N.C.	135	36	14	49	17	7	86	19	7
N. Dak.	39	39	35	6	6	5	33	33	30
Ohio	173	147	103	37	31	23	136	116	80
Okla.	119	112	97	71	66	60	48	46	37
Oreg.	72	28	10	24	13	7	48	15	3
Pa.	206	105	29	15	11	1	191	94	28
R.I.	15	13	5	2	2	1	13	11	4
S.C.	71	58	44	40	31	26	31	27	18
S. Dak.	53	53	51	24	24	23	29	29	28
Tenn.	127	106	77	59	52	43	68	54	34
Tex.	476	403	256	203	176	149	273	227	107
Utah	32	29	24	18	17	15	14	11	9
Vt.	17	9	4	1	1	0	16	8	4
Va.	95	69	42	14	10	4	81	59	38
Wash.	96	38	12	47	21	6	49	17	6
W. Va.	83	57	51	22	19	18	41	38	33
Wis.	108	95	76	14	12	9	94	83	67
Wyo.	27	22	18	17	13	11	10	9	7

*Delaware, the District of Columbia and Hawaii had no unserved counties in 1977.

Second-Trimester Abortions

Of the approximately 118,500 second-trimester abortions performed in 1977, 67 percent took place in hospitals and 33 percent in clinics (see Table 9). These proportions represent a decline in the role of hospitals since 1976, when 76 percent of the 114,400 second-trimester abortions were carried out in hospitals. It is not certain whether or to what extent this diminished role for hospitals stems from the overall decline in their provision of abortion services; from recent restrictions on the number and type of procedures allowed by some hospitals; from the fact that some hospitals report dilatation and evacuation (D&E) procedures performed at 13 or 14 weeks as first-trimester operations; from other reporting errors; or from the continuing trend away from such inpatient second-trimester procedures as saline or prostaglandin instillation and toward greater use of D&E procedures performed at an earlier stage of pregnancy in outpatient clinics and physicians' offices.

Table 9. Number and percentage distribution of hospitals and clinics that perform second-trimester procedures, and number of second-trimester abortions performed by hospitals and clinics; according to metropolitan status, 1977

Measure and metropolitan status	Total		Hospitals		Clinics	
	No.	%	No.	%	No.	%
Abortions						
Total	118,500	100.0	79,700	67.3	38,800	32.7
Metro	110,200	100.0	75,200	68.2	35,000	31.8
Nonmetro	8,300	100.0	4,500	54.2	3,800	45.8
Providers						
Total	960	100.0	830	86.5	130	13.5
Metro	800	100.0	680	85.0	120	15.0
Nonmetro	160	100.0	150	93.8	10	6.2

In 1977, second-trimester abortions were being performed by 830 hospitals and 130 clinics. Among all hospital abortion facilities, the proportion that provided second-trimester procedures fell from 57 percent in 1976 and the first quarter of 1977 to 50 percent* in 1977 and the first quarter of 1978. Hospitals providing second-trimester procedures represent only 15 percent of the 5,400 short-term general non-Catholic hospitals in the United States. Data were not collected in the 1976-1977 AGI survey on second-trimester abortions performed in clinics,† but 24 percent of clinic providers responding to the 1977-1978 survey reported performing such late procedures in 1977.

As Table 9 indicates, the vast majority of all second-trimester abortion providers were located in metropolitan areas, and more than nine-tenths of all second-trimester procedures were carried out in metropolitan areas. Almost all of the 34 largest SMSAs, but only one-third of the 175 smallest SMSAs, had an identified second-trimester abortion provider.

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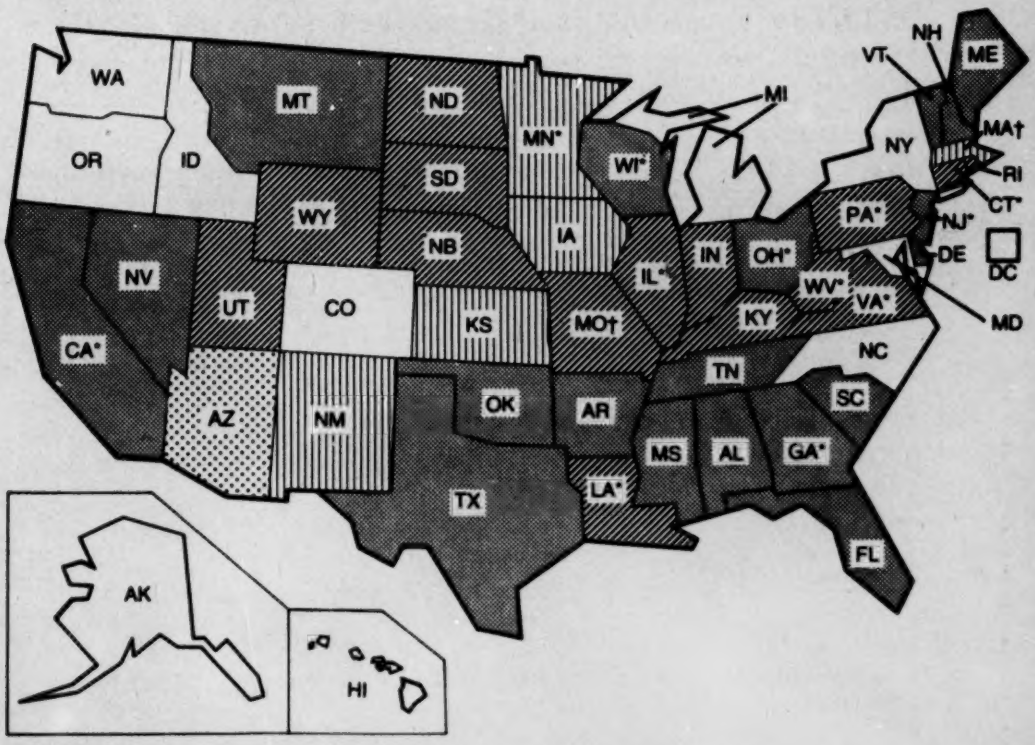
* Adjusted for changes in the 1977-1978 data available from California.

† A special survey conducted in 1976 indicated that 34 percent of clinics provided abortions in the 13th week of gestation or later. Because the survey questions and procedures were not the same as in the current survey, it is not possible to ascertain whether there has been a real decline between the two surveys. (See: B. L. Lindheim, "Services, Policies and Costs in U.S. Abortion Facilities," *Family Planning Perspectives*, 11:283, 1979.)

Map 2. State policies on public funding of abortions for Medicaid-eligible women (as of Nov. 1, 1979)



Pays for all or all medically necessary abortions, including those necessary for mental or physical health (in Oregon, will pay for only one abortion; two abortions for minors).

Hyde amendment language: Pays only for abortions when pregnant woman's life is endangered, or if pregnancy is the result of reported rape or incest, or if the woman would otherwise suffer severe and long-lasting physical health damage (California adds documented danger of fetal abnormality).

Pays only if the pregnancy endangers the pregnant woman's life.

Pays only if the pregnancy endangers the woman's life, and in cases of reported rape or incest (Iowa adds severe fetal deformity).

No Medicaid program.

*Court orders currently restrain enforcement of the restrictive laws and require payment for medically necessary abortions in California, Connecticut, Georgia, Illinois, Louisiana, Minnesota, New Jersey, Ohio, Pennsylvania, Virginia, West Virginia and Wisconsin.

†Court orders require states to pay for abortions that meet the Hyde amendment standards.

References

1. See J. D. Forrest, E. Sullivan and C. Tietze, *Abortion 1976-1977: Need & Services in the United States, Each State & Metropolitan Area,* The Alan Guttmacher Institute, New York, 1979, p. 101, for a discussion of the estimation of need.

2. C. Tietze, *Induced Abortion: 1979,* The Population Council, New York, p. 21.

3. J. D. Shelton, E. A. Brann and K. F. Schulz, "Abortion Utilization: Does Travel Distance Matter?" *Family Planning Perspectives,* 8:260, 1976.

4. W. Cates, Jr., K. F. Schultz, D. A. Grimes and C. W. Tyler, Jr., "The Effect of Delay and Method Choice on the Risk of Abortion Morbidity," *Family Planning Perspectives,* 9:266, 1977.

5. C. Tietze, 1979, op. cit., pp. 64-65.

6. J. D. Forrest et al., 1979, op. cit.

7. J. D. Forrest, C. Tietze and E. Sullivan, "Abortion in the United States, 1976-1977," *Family Planning Perspectives,* 10:271, 1978, Table 3; and J. D. Forrest, et al., 1979, op. cit., Table 15.

8. C. Tietze and A. J. Jain, "The Mathematics of Repeat Abortion: Explaining the Increase," *Studies in Family Planning,* 9: 294, 1978.

9. The Alan Guttmacher Institute (AGI), *Abortion: Need, Services and Policies, 50 State Profiles,* New York, 1979 (in press).

10. AGI, *Abortions and the Poor: Private Morality, Public Responsibility,* New York, 1979, pp. 13 and 17.

11. Office of Research, Demonstrations and Statistics, Health Care Funding Administration, DHEW, "Quarterly Report, Medicaid-Financed Abortions Under P.L. 95-205, April 1, 1979-June," Attachment B, Washington, D.C., Aug. 11, 1979 (mimeo).

12. AGI, *Abortions and the Poor . . .,* 1979, op. cit., Figure 19.

APPENDIX I

AMERICAN PUBLIC HEALTH ASSOCIATION

RESOLUTION

Adopted

November, 1979

THE RIGHT TO SECOND TRIMESTER ABORTION

The American Public Health Association,

Recognizing that it has consistently advocated women's right to abortion (Resolution #7626), physicians' freedom to perform abortion, and state legislation for legal abortion (#6718); and has urged the removal of state statutes restricting abortion (#7118), and supported the inclusion of abortion in public funding (#7025);

Acknowledging that although the United States Supreme Court has recognized women's right to abortion to the point of viability in the 1973 *Doe vs. Wade* decision, anti-abortion groups are harassing women seeking abortions, as well as abortion providers across the country, and are creating immense pressure on physicians who perform later abortion procedures; and

Further while acknowledging the greater safety of first trimester abortions, it is recognized that women who seek later termination abortions are often treated disrespectfully by hospital personnel who oppose abortion; and

Noting that only 9 percent of legal abortions are performed in the second trimester of pregnancy; that greater use of the dilatation and evacuation procedure make it possible to perform the vast majority of second trimester abortions during or prior to the 16th week after the last menstrual period (LMP), which is the 14th week of pregnancy; and that most women who seek abortions after the 16th week LMP are facing severe social and health circum-

stances, such as pregnancy at a very young age or involving a fetus with known serious congenital abnormalities or disease; and

Noting that through curtailment of funding at both the federal and state levels, poor women have seen their right to abortion erode; therefore

1. Renews its support of women's right to abortion up to and to the point of viability.
2. Urges strong opposition to local and state proposed or enacted ordinances which present misleading and non-factual information which may be perceived to frighten and harass women who choose abortion and health care providers performing these abortions.
3. Urges endorsement of educational programs which train physicians and health care personnel to provide safe later abortion techniques of Dilatation and Evacuation and saline infusion.
4. Urges endorsement of the provision of second trimester abortion in free-standing qualified clinics that meet the state standards required for certifications.

Reference:

1. Grimes DA, *et al*: Mid-trimester abortion by dilatation and evacuation: a safe and practical alternative. N. Engl. J. Med. 296: 1141-1145, 1977.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

CIVIL ACTION No. C 80-0285 L(A)

Decided Dec. 3, 1980

WALTER M. WOLFE, et al, *Plaintiffs*,

v.

GRADY STUMBO, et al, *Defendants*.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This action presents a constitutional challenge to K.R.S. 311.760(2) and 436.023 and the administrative regulations adopted pursuant to these statutes. In approaching this case, this Court's task is to resolve the issues presented here by constitutional measurement free of emotion and predilection, see *Roe v. Wade*, 410 U.S. 113 (1973), and pursuing this quest, this Court is bound by the decisions of the United States Supreme Court and the jurisprudence that has evolved.

K.R.S. 311.760(2) provides as follows:

> "An abortion may be performed in this state only under the following circumstances:
>
> • • •
>
> "(2) After the first trimester of pregnancy, except in cases of emergency to protect the life or health of the pregnant woman, where an abortion is permitted under other provisions of KRS 311.730 to 311.810, by a duly licensed physician in a hospital duly licensed by the Kentucky health facilities and health services certificate of need and licensure board."

K.R.S. 436.023 provides as follows:

> "(1) No abortion shall be performed on any woman without the passing of at least a twenty-four (24) hour period between the filing of the written consent, by the required consenting parties, and the actual performance of the abortion unless an emergency situation presents imminent peril substantially endangering the life of the woman.
>
> "(2) Any person violating subsection (1) of this section shall be imprisoned in the county jail not to exceed one (1) year or a fine not to exceed one thousand dollars ($1,000), or both."

The individual plaintiffs are gynecologists and obstetricians one of whom is on the faculty of the University of Louisville Medical School, who performed abortions at the Surgical Arts Centre, Inc. in Louisville, Kentucky (hereinafter referred to as the Clinic). The Clinic is also a plaintiff herein, and is the facility where ninety percent of the abortions performed in Kentucky are carried out.

The record contains convincing proof that no hospitals in Kentucky will allow second trimester abortions to be performed, except for therapeutic reasons, and that abortions which are done for therapeutic reasons constitute a very small portion of the total abortions which are being performed. The evidence further demonstrates that plaintiffs' clientele consists of women from Kentucky, Tennessee, Indiana, Ohio, Illinois and West Virginia, and that sixty percent of these women are nonresidents of Kentucky. It also demonstrates that a substantial number of persons upon whom abortions are performed are women in their teens, and that at least fifty-six percent are 19 years of age or younger.

The method by which plaintiffs carry out their abortion operations is known as the dilatation and evacuation method, hereinafter D&E. The use of the D&E method com-

menced after the opinion of the Supreme Court in *Roe v. Wade, supra* was handed down, and has now gained widespread acceptance. It is generally recognized by the American Public Health Service and the Gynecology Section of the American Medical Association that it is the safest method of performing second trimester abortions. Statistics offered by the plaintiffs and accepted by the Court indicate also that the abortion mortality rate, using the D&E method, is considerably lower than the mortality rate for women who carry their pregnancies to term. This is especially true for the period of gestation ranging between 18 and 20 weeks.

The weight of the evidence is to the effect also that delays in carrying out abortion procedures increase the risk of complications and mortality, although this Court is not convinced that such risks in exposure to increased mortality rates are nearly as significant as they are portrayed by the plaintiffs.

There is also convincing evidence to the effect that the women who come to the Clinic have already received a diagnosis of pregnancy and have already made up their minds to have an abortion. The weight of the evidence also is to the effect that to require a twenty-four hour waiting period will impose significant financial burdens and, to some extent, emotional burdens upon women who come to the Clinic from areas outside of Louisville, as so many of them do, and who will be forced in many instances to incur extra expense during a waiting period, which could be as much as three or four days because of the intervention of a weekend when the consent is given on a Friday.

The evidence demonstrates that the Clinic has performed some 12,000 abortions during its history, and that no mortalities have occurred, and that its facilities for the carrying out of such procedures are on a par with those available in hospitals, except for the fact that a blood supply is not maintained at the Clinic. However, the Clinic

is only one block from several hospitals and easy access to the hospitals is available.

Two recent decisions, that of District Judge Elmo B. Hunter in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,* 483 F.Supp. 679 (W.D. Mo. 1980) and that of District Judge Robert F. Collins in *Margaret S. v. Edwards,* 488 F.Supp. 181 (E.D. La. 1980), are persuasive. Also very instructive are the recent United States Court of Appeals for the Sixth Circuit decisions in *Mahoning Women's Center v. Hunter,* 610 F.2d 456 (1979) and *Charles v. Carey,* 627 F.2d 772 (1980).

In *Planned Parenthood Association of Kansas City v. Ashcroft, supra,* Judge Hunter held that Missouri's Revised Statute 188.025, which is identical to K.R.S. 311.760 (2), was unconstitutional. Judge Hunter found, as does this Court here, that D&E is the safest of the presently available post-twelve week abortion techniques, and he also found that D&E procedures were performed at only one hospital in the State of Missouri. He likewise found that as a result the D&E technique was simply unavailable to many pregnant women in Missouri. He reasoned that the states' limitation of post-twelve week abortions to hospitals cannot stand as a reasonable regulation for the protection of maternal health. He concluded that the effect of the regulations was to make unavailable the most commonly utilized and the safest post-twelve week abortion technique.

He further found that as a practical matter, it might force a woman and her doctor to terminate her pregnancy by a method more dangerous to her health than the method outlawed. He also pointed out that the availability of the D&E procedure in one hospital on the eastern boundary of Kansas did not convince him that D&E was a meaningful and accessible alternative to a large number of women in Missouri because of the distances involved between their homes and the location of the hospital. See 483 F.Supp. at pp. 686-687.

In reaching his decision, we believe that Judge Hunter correctly analyzed *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976), where the Supreme Court had held that a Missouri statutory prohibition on the use of saline instillation as a post-twelve week abortion technique was not a reasonable regulation for the protection of maternal health. The court pointed out at 428 U.S. pp. 78-79:

> "The State, . . . would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to materal mortality, than even continuation of the pregnancy until normal childbirth. Moreover, as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed."

The Supreme Court also found, in *Planned Parenthood v. Danforth, supra,* that the existence of prostaglandins instillation, a technique actually safer than the saline technique, did not justify the ban on saline, since the prostaglandins alternative was at that time unavailable as a practical matter in the State of Missouri. The court held that the prohibition of the saline technique was unreasonable and arbitrary, since it had the effect of inhibiting the vast majority of abortions after the first twelve weeks.

In *Planned Parenthood Association of Kansas City v. Ashcroft, supra,* Judge Hunter also found that the forty-eight hour waiting period imposed by Missouri statute was an undue burden on the abortion decision, which increased the risk to the woman's health. He found that the forty-eight hour delay could have the effect of a much longer delay due to the nature of physicians' working schedules, and that such a delay has a disproportionate impact on minors who generally seek abortions at a later stage of pregnancy. He also held that the forty-eight hour waiting

period imposed additional expenses and time for women living outside the metropolitan areas, but predicated his decision that it was unconstitutional on the health interests of the women seeking abortions. See 483 F.Supp. at p. 696.

In *Margaret S. v. Edwards, supra,* Judge Collins, after finding that the D&E was far safer than any other method of abortion after a twelve-week gestation period, and that it was safer than childbirth up to the eighteenth week, went on to hold that a Louisiana statute which required an abortion after the first trimester to be performed in a hospital was unconstitutional.

After discussing other sections of the Louisiana statute not pertinent here, Judge Collins went on to hold that a twenty-four hour waiting period mandated by the Louisiana statute was unconstitutional because of burdens on the woman's health as a result of a possible wait of as much as three to five days because of weekends. The basis for the holding is that this requirement places a significant and unconstitutional burden upon a woman's ability to obtain an abortion, and that a regulation limiting access to the abortion procedures may be justified only by a "compelling state interest" and must be narrowly drawn to express only the legitimate state interests at stake. See *Roe v. Wade, supra,* at p. 155 and *Margaret S. v. Edwards, supra,* at pp. 212-213.

In addition to the opinions of Judges Hunter and Collins, we now have the benefit of the opinion of the Seventh Circuit in *Charles v. Carey,* 627 F.2d 772 (1980), and more particularly discussion which appears at pp. 785-786, where it held unconstitutional the twenty-four hour mandatory waiting period. The court held that the twenty-four hour mandatory waiting period imposed increased risks as pregnancy progressed, especially for working women and women who must travel longer distances and who must arrange for overnight accommodations or make two trips. It was held that the statute was subject to strict scrutiny,

since it affected the fundamental privacy rights of women who decide to terminate their pregnancies.

Defendants relied heavily upon the decision of the Sixth Circuit in *Wolfe v. Schroering,* 541 F.2d 523 (1976). In that decision, the record is clear that the plaintiffs presented no evidence to show that the twenty-four hour waiting period would, in effect, impose increased health risks or increased financial burdens upon pregnant women seeking an abortion. That fact is made clear by the words of the court itself appearing at p. 526. That case, therefore, is not a precedent for the case at bar in which plaintiffs have, in fact, produced substantial evidence as to the increased risks which would be imposed upon pregnant women by virtue of the required waiting period, as well as evidence of increased expenses and anxiety.

This Court recognizes the significant emotional trauma that may follow a woman's decision as to whether to terminate an unwanted pregnancy. However, the weight of the evidence is to the effect that the women who come to the Clinic seeking abortions have already made their decisions. The twenty-four hour waiting period will not alter the previously made decision, nor is there evidence suggesting that it would make the decision any less emotionally trying.

The cases upon which the defendants rely, such as *Gary-Northwest Indiana Women's Services, Inc. v. Bowen,* Civil Action H74-289, (N.D. Ind., September 12, 1980), are cases that this Court respectfully disagrees with, since they are based upon a misconception of the holding in *Roe v. Wade, supra.* The writers of those opinions failed to consider that the Supreme Court specifically held as early as 1973 in *Roe v. Wade, supra,* that medical knowledge is not a static thing, and that as medical knowledge and new techniques are evolved, the first trimester limitations may, in some instances, not be controlling. The *Gary-Northwest Indiana Women's Services, Inc. v. Bowen, supra,* case held that it

was bound by the language of *Roe v. Wade, supra,* and, that in effect it was graven in stone. This completely overlooks the Supreme Court's reliance on improvements in medical techniques and skills which were involved in the Supreme Court's invalidating the saline instillation legislation in *Planned Parenthood v. Danforth, supra.*

In conclusion, we hold that the statutes challenged by the plaintiff and the regulations adopted pursuant to them are unconstitutional and a judgment in accordance with these findings of fact, conclusions of law and opinion will be entered this day.

Dated 12-3-80

/s/ CHARLES M. ALLEN
Charles M. Allen
Chief Judge

JUDGMENT

This action, having been tried before the Court on the merits and on the motion of the plaintiff for a permanent injunction, and the Court, having heard the evidence and considered the arguments of counsel, and the briefs of the parties, and the brief of the amicus curiae, and being fully advised in the premises and having filed its findings of fact, conclusions of law and memorandum opinion.

IT IS ORDERED AND ADJUDGED that the defendants, their servants, agents, attorneys and all those acting in concert with them are permanently enjoined from enforcing K.R.S. 311.760(a) and K.R.S. 436.023 and the administrative regulations adopted pursuant to those statutes.

IT IS FURTHER ORDERED AND ADJUDGED that said statutes be and they are hereby held unconstitutional, as are the regulations adopted pursuant to them.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs shall recover their costs herein expended.

This is a final and appealable judgment and there is no just cause for delay.

Dated 12-3-80

/s/ CHARLES M. ALLEN
Charles M. Allen
Chief Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1431

Decided August 18, 1980.

CHRIS SIMOPOULOS, M.D., *Appellant*,

-v-

VIRGINIA STATE BOARD OF MEDICINE; MARSHALL COLEMAN, Attorney General of Virginia; FAIRFAX HOSPITAL ASS'N; and POTOMAC HOSPITAL; their agents, successors, and those in concert with them, *Appellees*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge

Before BUTZNER and RUSSELL, Circuit Judges.

PER CURIAM:

Chris Simopoulos, M.D., moves for restoration of his license to practice medicine in Virginia pending an appeal from a district court order denying his request for an injunction against the Virginia State Board of Medicine. We grant the motion.

Simopoulos operates a clinic in Northern Virginia, where at the request of a minor patient in her second trimester of pregnancy, he injected a saline solution to abort a fetus. He was convicted of violating Va. Code §§ 18.2-71, 2-73, which prohibit second trimester abortions outside of licensed hospitals. Simopoulos challenges the constitutionality of these sections on two grounds: hospitalization is not necessary for the health of a woman undergoing a second trimester abortion; and the only hospitals allowing

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second trimester abortions in the Northern Virginia area require parental consent for minor patients.

After Simopoulos's conviction, his license to practice medicine in Virginia was summarily revoked in accordance with Va. Code § 54.321.2. Simopoulos then brought suit in district court under 42 U.S.C. § 1983 charging that his license had been unconstitutionally revoked. The district court denied his request for an injunction and dismissed his complaint.

Simopoulos appealed the dismissal of his complaint to this court and requested an injunction pending appeal. The pleadings disclosed that within a few weeks the Board of Medicine would consider his application for reinstatement. Perceiving no irreparable harm, we summarily denied his petition.

Simopoulos now has been heard by the Board. He introduced evidence from recognized authorities to prove the safety of his procedures, and he presented supporting letters from other members of the Northern Virginia medical community attesting to his character and ability. The state presented no evidence other than proof of his conviction.

Virginia Code § 54.321.2 allows reinstatement on the vote of three-fourths of the Board members based on consideration of three criteria:

> (i) the likelihood of irreparable damage to the practitioner if his . . . license should be . . . revoked during the pendency of an ultimately successful appeal,
>
> (ii) the likelihood of injury or damage to patients or the public if the license . . . is not suspended or revoked, and
>
> (iii) the seriousness of the offense.

The Board voted 9 to 4 in favor of Simopoulos, but this poll did not satisfy the requirement that three-fourths of the members must vote for reinstatement.

Following the hearing, Simopoulos renewed his request for an injunction pending appeal. Airport Commission of Forsyth County, North Carolina v. Civil Aeronautics Board, 296 F.2d 95 (4th Cir. 1961), governs our consideration of Simopoulos's motion. He must show that: (1) he will be irreparably injured without the injunction; (2) the other parties in interest will not be substantially harmed; (3) the injunction is in accord with the public interest; and (4) there is a strong likelihood of success on the merits of the appeal.

Under the Board's decision, Simopoulos will not be allowed to practice medicine during the pendency of his criminal appeals, which the Assistant Attorney General estimates may take several years. The denial of his right to practice his profession for an extended period establishes irreparable harm.

The interest of the state and the public are closely related. If we do not grant an injunction, Simopoulos's patients will be deprived of his services for several years. If we grant the injunction, we perceive no injury to the public. The record includes a resolution of the American Public Health Association in favor of allowing second trimester abortions in licensed clinics; a resolution of the Executive Committee of the Potomac Hospital Medical Staff supporting Simopoulos's reinstatement; and letters from the pathologist of Potomac Hospital and two professors of George Washington University, one of whom was also chairman of obstetrics for Fairfax Hospital and now teaches obstetrics at George Washington. All of the letters attest to Simopoulos's skill and reputation. The only expert to testify at the criminal trial approved of Simopoulos's clinical facilities and his methods. The lack of harm to the

public interest is also indicated by the vote of a majority of the doctors on the Board of Medicine to reinstate his license.

The merits of Simopoulos's appeal in this court depend in part on the merits of his criminal appeal. At this stage of the proceedings, we observe, without reaching any definitive conclusion, that, although the Supreme Court has not addressed the precise issue, Simopoulos's position commands respectable support. Planned Parenthood v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980). *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Hallmark Clinic v. North Carolina Department of Human Resources, 380 F. Supp. 1153, 1158-59 (E.D.N.C. 1974) (three-judge court).

Accordingly, we grant Simopoulos's motion, and we will enter an order requiring the restoration of his license pending appeal, conditioned on his compliance with the Virginia abortion laws.

APPENDIX I.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C78-155A

Filed Oct. 4, 1979

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al
Plaintiffs,

VS.

CITY OF AKRON, et al
Defendants.

ORDER

The above captioned matter is before the Court upon plaintiffs' "Motion For A New Trial Or In The Alternative To Alter Or Amend The Judgment." Upon consideration and for the reasons stated below, plaintiffs motion shall be granted in part and denied in part.

Plaintiffs instituted this action challenging Ordinance Number 160-1978, "amending and supplementing the Codified Ordinances of the City of Akron, Ohio, 1975, by the amendment of Chapter 1870, entitled 'Regulation of Abortions,' " on April 19, 1978. The Court duly heard testimony and received exhibits addressed to the constitutionality of the various sections of Ordinance Number 160-1978. By its Memorandum Opinion and Order of August 22, 1979, the Court found certain sections of the challenged ordinance constitutional; found certain other sections unconstitutional; and determined that plaintiffs lacked standing to challenge the remaining sections. By the instant motion, plaintiffs seek reconsideration of that part of the Court's opinion finding that they lacked standing to challenge Section 1870.03 of Akron Ordinance 160-1978.

The defendant intervenors have opposed the plaintiffs' motion for a new trial arguing that it should be denied because of the plaintiffs' failure to comply with Rule 59(b). Rule 59(b) states that a motion for a new trial shall be served not later than ten days after the entry of judgment. Plaintiff-intervenors recognize that plaintiffs' motion was timely filed, but say that because they were not served with the motion within the ten day time period the motion must be denied.

While it would have been preferable for the plaintiffs to give service to all groups involved, the plaintiffs' failure to send notice to defendant-intervenors was apparently due to their understanding that the interests of minors, represented by the defendant-intervenors, were not implicated by the substantive arguments raised in the motion. To the extent that a motion under Rule 59 affects the time for appeal for all persons involved in the action, notice should be sent to all persons who have appeared. See Rule 4(a)(4), Federal Rules of Appellate Procedure. The crucial aspect of Rule 59 is the ten day period. 6A Moore's Federal Practice ¶ 59.09. Construing Rule 59 in light of Rule 1, Federal Rules of Civil Procedure, the Court determines that plaintiffs' motion for a new trial is proper and the Court will consider the merits of the issues raised.

Section 1870.03 is as follows:

> No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.

Plaintiffs did not brief their standing to attack this section of Akron's ordinance prior to the Court's issuance of its opinion. Further, there was evidence that none of the plaintiffs engaged in performance of abortions subsequent to the end of the first trimester. The coordinator of the Akron Women's Clinic, however, did express a desire to engage

in performance of abortions during the early part of the second trimester. When questioned at trial as to why her clinic did not provide such abortions, she testified that Akron already had an ordinance that prevented provision of such abortions in a clinic setting. Based upon that testimony, the Court concluded:

> If Section 1870.03 were declared unconstitutional . . . such abortions could still not be performed in a clinic because of a preexisting Akron ordinance that is not here under attack. Plaintiffs, therefore, lack standing to challenge Section 1870.03.

Plaintiffs have now, by their brief in support of the instant motion, addressed their standing to challenge Section 1870.03. Apparently, the preexisting ordinance to which the coordinator of Akron Woman's Clinic made reference was also numbered 1870.03 and was in all respects identical to the section here under consideration. Further, Section 2 of Ordinance Number 160-1978 provided:

> That the existing Sections 1870.01, 1870.02, and 1870.03 of the Codified Ordinances of the City of Akron, Ohio, 1975, enacted by Ordinance No. 993-1976, be and hereby are repealed.

Accordingly, based upon the facts plaintiffs have now brought to the Court's attention, that part of its Memorandum Opinion and Order of August 22nd finding plaintiff Akron Women's Clinic without standing to challenge Section 1870.03 of Ordinance Number 160-1978 shall be vacated. Reaching the merits of the plaintiffs' constitutional challenge, the Court finds Section 1370.03 constitutional and plaintiffs' request for declaratory and injunctive relief in regard to it shall be denied.

In *Roe v. Wade*, 410 U.S. 113, 153 (1973), the Supreme Court held that the Fourteenth Amendment's protection of certain aspects of personal privacy included a guarantee

that a woman could decide whether to terminate her pregnancy without unjustified state interference. Inasmuch as the woman's right to make an unencumbered decision concerning abortion was found in the "fundamental right" of privacy, the Court stated that interference with that right could be justified only by a "compelling state interest." *Roe, supra* at 155. The Court further recognized that the state had a valid interest in maternal health and the protection of potential human life. The state's interest in potential human live was found to become "compelling" at viability. The state's interest in protecting maternal health, "in the light of present medical knowledge," was found to become "compelling" at approximately the end of the first trimester. *Roe, supra* at 163. Section 1870.03 was passed in furtherance of this asserted compelling state interest in protecting maternal health from the close of the first trimester of pregnancy.

Plaintiffs' attack Section 1870.03 saying that although abortions beyond the end of the first trimester of pregnancy were safer in a hospital setting at the time of the *Roe* decision, that is no longer true. Plaintiffs presented evidence in the form of testimony and exhibits to support a finding that early second trimester clinical abortions are now just as safe as early second trimester hospital abortions. The Court, however, does not find plaintiffs' evidence on this issue so convincing that it is willing to discard the Supreme Court's formulation in *Roe*. Accordingly, the Court finds that Section 1870.03 furthers the compelling state interest in protection of maternal health and is, therefore, constitutional.

Based upon the foregoing, plaintiffs' "Motion For A New Trial Or In The Alternative To Alter Or Amend Judgment," is hereby granted in part and denied in part. That part of the Court's Memorandum Opinion and Order finding Akron Women's Clinic without standing to challenge Section 1870.03 of Ordinance 160-1978 is hereby vacated. Further, Section 1870.03 is hereby found to be constitutional and plaintiffs' request for declaratory and injunctive relief is hereby denied.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
Leroy J. Contie, Jr.
U.S. District Judge

APPENDIX M

Defendant's Exhibit A

STATE OF INDIANA
COUNTY OF MARION, SS.

AFFIDAVIT

I, Robert A. Calhoun, after being duly sworn upon my oath depose and say that:

1. I am presently the Director of the Public Health Records Division of the Indiana State Board of Health and have been so employed at all times pertinent to the events stated herein.

2. As Director of the Public Health Records Division it is part of my duties to supervise record keeping activities within the Division and compile information from various reports for use by the division.

3. Attached hereto is a true and accurate copy of the data compiled by the Public Health Records Division concerning terminated pregnancies by hospital and the procedures used thereby for the period of January 1, 1978, through December 31, 1978, where the gestation period was greater than twelve (12) weeks or unknown.

Further affiant sayeth not.

/s/ ROBERT A. CALHOUN
Robert A. Calhoun

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 22nd day of April, 1980.

/s/ JANIS C. (EHRMAN) KAMPLAIN
Notary Public

My Commission Expires:
May 3, 1980

County of Residence:
Marion

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DIVISION OF VITAL RECORDS

TERMINATED PREGNANCIES BY HOSPITAL AND PROCEDURE USED - GESTATION PERIOD GREATER THAN 12 WEEKS

PERIOD 01/01/78 12/31/78

HOSPITAL	COUNTY	SUCTION CURRETTAGE	AMNIOTIC FLUID REPLACEMENT	HYSTEROTOMY OR HYSTERECTOMY	SHARP D AND C	OTHER	UNKNOWN
FAIRFIELD SURGICENTER	ALLEN	9					
FT. WAYNE WOMEN HEALTH ORG.	ALLEN	13					
GARY NORTHWEST IN. WOMEN SERV.	LAKE	1					
INDIANAPOLIS WOMENS CENTER	MARION	38					
MERIDIAN WOMENS CLINIC, INC.	MARION	40					
CLINIC FOR WOMEN, INC	MARION	41					
SOUTH BEND WOMEN PAVILLION	ST. JOSEPH	1				41	
BARTHOLOMEW COUNTY HOSP.	BARTHOLMW	2				1	
WITHAM MEMORIAL HOSP	BOONE				7		
HENRY COUNTY MEMORIAL HOSP.	HENRY	1			2		
JOHNSON COUNTY MEMORIAL HOSPITAL	JOHNSON	1					1
METHODIST HOSP OF GARY	LAKE	5					
BROADWAY METHODIST HOSPITAL	LAKE	3					
METHODIST HOSPITAL OF IND.	MARION			1			
WISHARD MEMORIAL HOSPITAL	MARION	59			1	4	
COMMUNITY HOSPITAL OF INDPOLIS	MARION	13					
BLOOMINGTON HOSPITAL	MONROE	24					
MONTGOMERY CNTY CULVER UN.SV	MONTGOMERY	7					
PORTER MEMORIAL HOSPITAL	PORTER	5					
WELVORN MEMORIAL BAPTIST HOSP	VANDERBURG						6
FACILITY NOT REPORTED	******	1					2
FINAL TOTALS		274		1	10	46	19

No. 80-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated,
Appellants,

v.

OTIS BOWEN, Governor; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner; THEODORE SENDAK, Attorney General; Their Agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Northern District of Indiana

MOTION TO AFFIRM

LINLEY E. PEARSON
Attorney General,
State of Indiana

MICHAEL SCHAEFER
Deputy Attorney General,
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Counsel for Appellees.

Central Publishing Company, Inc., Indianapolis, IN 46206

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Appellees.

On Appeal from the United States District Court for the Northern District of Indiana

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States District Court for the Northern District of Indiana be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

Reasons Why the District Court Should be Affirmed

Introduction

This appeal presents a constitutional question conclusively decided in the landmark case of *Roe* v. *Wade*, 410 U.S. 113 (1973). The Plaintiffs have, from time to time, challenged an Indiana statutory requirement for second trimester hospital abortion and the District Court has, each time, found that Indiana's second trimester hospitalization requirement is constitutional.

The Questions Are Not Substantial

1. *The District Court correctly followed this Court's decision in* Roe v. Wade *which explicitly permits states to require hospitalization for second trimester abortions.*

The District Court relied on the following express language of this Court in *Roe* v. *Wade*:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

> *Examples of permissible state regulations in this area are requirements* as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status*; as to the licensing of the facility; and the like. *Ibid.*, 410 U.S. 113, at 163. (Emphasis added by District Court).

The emphasized language means what its plain meaning indicates: the term "whether" means a state *may* decide *if* a hospital is the appropriate facility for a second trimester abortion.

The Plaintiffs' theory disregards this clear directive from the Supreme Court despite warnings from the Court that it will not retreat from its holding in *Roe*. For example, in *Maher* v. *Roe*, 432 U.S. 464, (1977), this Court cautioned,

> Our conclusion signals no retreat from *Roe* or the cases applying it. *Ibid.*, 432 U.S. at 475.

The net result of Plaintiffs' theory would be to totally abandon the *Roe* v. *Wade* trimester anaylsis as the test to mediate the individual's constitutional right of privacy and the state's interest in protecting and promoting maternal health. The District Court's unanimous opinion (App. A, at 10a) perceptively noted that Plaintiffs' position, as supported by but two, single judge District Courts, substitutes a new test for the long-standing trimester anaylsis of this Court, namely, whether the particular abortion is more dangerous than childbirth. However, to retreat from the *Roe* trimester analysis will inevitably lead to a total surrender of the state's interest into the judgment of the individual physician. To accept Plaintiffs' attempted inroads on *Roe* v. *Wade*, not only will upset long-standing reliance on *Roe's* clear directive, but it will add impetus to a creeping anti-nomianism whose logical conclusion and objective is no regulation at all, anywhere—anytime, whether it be generally applicable surgical standards,

contra, Baird v. *Mass Dept. of Public Health*, 599 F.2d 1098, (1st Cir. 1979), or even the medical qualification of the practioner, *contra, Connecticut v. Menillo*, 423 U.S. 9 (1975). At such end point, a subjective test replaces the objective test and the state would be unable to assert its rightful interest in maternal health without offending the due process—notice considerations found to be present by this Court in *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

2. *The Plaintiffs failed to demonstrate a likelihood of success on the merits to justify a preliminary injunction.*

The requirements which petitions for preliminary injunctions must meet are irreparable injury and likelihood of success on the merits. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975).

In addition to the theoretical defect in Plaintiffs' legal theory, the District Court further found that Plaintiffs' theory, even if accurate, lacked sufficient evidence to support it. The District Court ruled:

> There was presented no evidence sufficient to convince this Court that birth is more dangerous than early second trimester D & E abortions. (*Ibid.*, App. A, at 17a).

This finding was supported, in part, by a comparison of the United States' D & E mortality rate of 7.6/100,000 for the thirteenth to fifteenth week or 13.2/100,000 for the sixteenth to twentieth with the lower Indiana maternal death rate of 7.0/100,000 in 1977 or 10.8/100,000 in 1978. These statistics show that childbirth is less dangerous than a second trimester D & E abortion. (*Ibid.*, App. A at 17a). The District Court further found that one Plaintiff, Dr. Lewis, deserved very little credibility. (*Ibid.*, App. A at 17a). The District Court further found that hospitals are available, specifically including Gary Methodist hospitals. (District Court Opinion, App. A. at 7a; *see also* Defendants' Exhibit A, App. M at 88a). In light of the above evidence and findings, appellant severely understates the failure of

proof in the District Court when *he* faults that Court for relying on "facially imprecise evidence." (Appellant's Jurisdictional Statement, at 26). It is not the place of the Supreme Court of the United States, or any appellate court, to reappraise evidence or determine the credibility of witnesses. *Roemer* v. *Bd. of Public Works of Maryland*, 426 U.S. 736, 758 (1976); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952); *see*, Rule 52(a), Fed. R. Civ. Pro.

3. *The question whether the District Court correctly treated Plaintiffs' supplemental petition as a modification of final judgment preserves no reversible error.*

This is an action that was commenced on November 13, 1974, attacking Indiana's Abortion Statute. (App. E at 31a). In addition to striking down and permanently enjoining the statute's provisions for parental consent, the District Court also ruled on Plaintiffs' attack on this same second trimester hospitalization requirement:

> Whether a hospital requirement for the second trimester per se comports with a "reasonable regulation" standard is not certain and need not be decided at this point. But at the very least in instances where a preliminary injunction is sought and the plaintiff bears the burden of showing a likelihood of ultimately prevailing, the foregoing language of the Court is sufficient grounds for denying the requested preliminary relief. *Ibid.*, App. E at 35a.

The defendants appealed the permanent injunction; the Supreme Court affirmed. 429 U.S. 1067. The Plaintiffs did not cross-appeal the second trimester holding. The District Court granted permanent relief on September 14, 1976. As this injunction was elevated from the status of preliminary injunction to a permanent injunction, its silence on the hospitalization requirement, found earlier to be constitutional, does not deprive it of its "finality." The Plaintiffs non-action over the following four years was ended only by the institution of criminal proceedings. (*See*,

District Court Memorandum, App. A at 3a). (Plaintiffs' assertion that other factors motivated the filing of their "supplemental petition" is entirely self-serving; *see*, Appellants' Jurisdictional Statement, at 6-7.) By whatever color appellants called their pleading designed to enjoin the criminal prosecution of Dr. Lewis, the District Court reached the issue on their likelihood of prevailing on the merits. The District Court had previously and unanimously found the challenged statute constitutional; it simply did so again on September 12, 1980.

CONCLUSION

Appellees respectfully pray that the Supreme Court affirm the September 12, 1980 order of the unanimous United States District Court for the Northern District of Indiana.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Michael Schaefer
Michael Schaefer
Deputy Attorney General
Counsel for Appellees

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6210
February, 1981.